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91-1641

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

JONATHAN M. WIENER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in actions under the Freedom of Information Act to compel agency disclosure of records, the government should be required to provide the plaintiff with as much detail as possible about each withholding at issue, even if such detail is not needed to prove that the withheld material is exempt from disclosure under the Act.

2. Whether, in imposing its maximum-detail standard, the court of appeals established erroneous substantive requirements for the exemptions in this case that conflict with this Court's decision in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and decisions of other courts of appeals.

PARTIES TO THE PROCEEDINGS

Petitioners are the Federal Bureau of Investigation (FBI) and the FBI's field offices in Los Angeles, California, New York City, New York, and Detroit, Michigan.

Respondent in this case is Jonathan M. Wiener.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Bureau of Investigation, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended (App., *infra*, 1a-31a), is reported at 943 F.2d 972. The order of the court of appeals denying rehearing (App., *infra*, 39a-40a) is reported at 951 F.2d 1073. The opinion of the district court (App., *infra*, 32a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1991. A petition for rehearing was denied on December 16, 1991. App., *infra*, 39a-40a. On March 9, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Relevant portions of the Freedom of Information Act, 5 U.S.C. 552, are set forth in the appendix. App., *infra*, 41a-43a.

STATEMENT

In this action to compel disclosure of FBI records under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(B), the district court granted summary judgment in favor of the government after reviewing six public declarations concerning the documents and reviewing, *in camera*, two additional declarations, as well as the disputed documents themselves. On appeal, the Ninth Circuit did not express any doubt that the district court had an adequate factual basis for its ruling. Nor did the Ninth Circuit hold that the district court was wrong on the merits. The Ninth Circuit nonetheless reversed and remanded because, in its view, the government's public declarations did not provide enough information to maximize respondent's ability to argue for disclosure of the documents. The court required the government on remand to adhere to a rule of brinksmanship by disclosing in its public declarations as much as it possibly can about each document without revealing the information claimed to be exempt from disclosure.

1. In February 1981, respondent Jonathan Wiener submitted FOIA requests for FBI documents relating to the late John Lennon of the Beatles. Clerk's Record (CR) 1, Exh. A. The FBI released some of the responsive records but withheld others, in whole or in part, on the ground that they were exempt from disclosure under FOIA. See 5 U.S.C. 552(b). In March 1983, respondent commenced this action in the United States District Court for the Central District of California, seeking to compel disclosure under 5 U.S.C. 552(a)(4)(B).[1]

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[1] Section 552(a)(4)(B) provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated,

The government subsequently filed two public "*Vaughn* index" declarations that described the withheld documents and explained the basis for withholding them.[2] One declaration dealt with the documents withheld under FOIA Exemption 1, the other with the documents withheld under other FOIA exemptions.[3]

The non-Exemption 1 declaration was prepared by FBI Special Agent Robert Chester. CR 18. Attached to the declaration was a copy of the responsive documents in redacted form, the same form in which they had been provided to respondent. The pages of the documents were numbered consecutively, with prefixes to indicate the source of the document—for example, "HQ-" indicated that a document had come from FBI Headquarters in Washington, D.C., and "NY-" indicated that a document had come from the FBI's New York City Field Office. In addition to these notations, there was a code on each page indicating both the FOIA exemption upon which the FBI relied in withholding the document and the type of exempt information that the document contained. For

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or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

[2] The term "*Vaughn* index" is derived from *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The index "usually consists of a detailed affidavit, the purpose of which is to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.'" *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn* v. *Rosen*, 484 F.2d at 826).

[3] FOIA Exemption 1, 5 U.S.C. 552(b)(1), exempts from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

example, the code "(b)(7)(C)/(5)" on a document indicated that the document was being withheld pursuant to FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), and that the document contained information that had been supplied to the FBI by a third party during an investigative interview. See CR 18 ¶ 23. In the text of the declaration, Special Agent Chester described each category of information withheld and explained why the information had been withheld. Chester stated that "[e]very effort was made to provide [respondent] with all reasonably segregable portions of the material requested." CR 18 ¶ 21. He also stated that "[t]o further describe with any more specificity the information being withheld would identify the very material sought to be protected." *Ibid.*

The Exemption 1 declaration was prepared by Special Agent Robert Peterson. CR 17. Special Agent Peterson "personally and independently examined the material sought by [respondent]." CR 17 ¶ 5. Based upon that examination, he stated that the only information redacted was information the disclosure of which "could be expected to cause damage to the national security" (*ibid.*), and that "the degree of declassification and marking for disclosure is as great as permissible without placing the national security in jeopardy" (CR 17 ¶ 6 n.8). Special Agent Peterson also described each category of classified information withheld and the justification for withholding it.

2. Respondent, asserting that these declarations were not sufficiently detailed, filed a "Motion to Compel Preparation of Adequate *Vaughn* Index." CR 12. In opposing this motion, the government contended that the affidavits provided an adequate basis for the district court to review the agency's decision to withhold the redacted information. CR 15. The government also invited the district court to review the disputed documents, which numbered approximately 280 pages, *in camera*. *Ibid.*

On March 14, 1984, the district court ordered the FBI to "file in camera and under seal, a declaration

or declarations which specifically explain the reasons the claimed exemptions apply in each instance in which an exemption is claimed." App., *infra*, 38a. The FBI responded by filing two *in camera* declarations prepared by the same declarants who had prepared the public declarations. In addition, the government filed, *in camera*, copies of the documents in unredacted form. CR 26.

In a memorandum order dated February 23, 1987, the district court stated that it had "reviewed the declarations submitted by [the FBI] and * * * [had] carefully compared those that have been filed and served on plaintiff's counsel with those that have been submitted for the court's *in camera* inspection." App., *infra*, 36a. Based upon that review, the court invited the government to move for summary judgment. *Ibid.* In subsequently moving for summary judgment, the government submitted an additional public declaration describing, *inter alia*, the events that led to the FBI's investigation of John Lennon. CR 49.[4]

The district court granted summary judgment in favor of the government on February 29, 1988. App., *infra*, 32a-35a. After listing the declarations that the government had submitted, the court found that the government had "carr[ied its] burden of proof to show that the FOIA exemptions were properly applied in this case." *Id.* at 35a. The district court concluded that "[t]he government's application of exemptions 1, 2, 3, 7(C) and 7(D) is within the applicable caselaw and has been properly applied," and that "[t]here is no genuine issue of material fact." *Ibid.*

3. The court of appeals reversed and remanded the case for further proceedings. App., *infra*, 1a-31a. The court did not question that the district court had an adequate factual basis upon which to grant summary

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[4] Respondent filed a cross-motion for summary judgment. CR 42, 44. In opposing the government's motion for summary judgment, respondent did not assert that he lacked "facts essential to justify [his] opposition" to the government's motion pursuant to Fed. R. Civ. P. 56(f).

judgment. Nor did it review the district court's ruling on the merits. Instead, the court of appeals held that the public *Vaughn* indices were insufficient because, in its view, the government could have disclosed more details about the documents without revealing information that was exempt from disclosure. *Id.* at 6a-28a. The court also held that this deficiency in the indices had not been cured by the district court's review of the *in camera* declarations and the documents themselves. *Id.* at 7a-8a. Finally, the court determined that the district court had not made adequate written findings of fact and conclusions of law. *Id.* at 28a-30a.

a. The court of appeals held, first, that the public *Vaughn* indices were inadequate because "[t]he FBI did not disclose all it could." App., *infra*, 7a. In the court's view, the "adversarial process is unnecessarily compromised" unless the government discloses in its *Vaughn* indices "as much information as possible" without revealing exempt information. *Ibid.* Only in this way, the court believed, would a requester have a full opportunity "to argue for release of particular documents." *Ibid.*

The court of appeals further held that the district court erred in resorting to *in camera* inspection. "[R]esort to *in camera* review," the court of appeals stated, "is appropriate only after the government has submitted as detailed public affidavits and testimony as possible." App., *infra*, 8a (internal quotation marks omitted).

b. The Ninth Circuit then elaborated upon the task it assigned to the government on remand with respect to each of the exemptions claimed. In doing so, the court repeatedly emphasized that the government must disclose as much detail as possible, in order to maximize respondent's ability to argue for disclosure.

Under FOIA Exemption 1, the government withheld information that it determined would reveal confidential intelligence sources, intelligence activities and methods, and cooperative intelligence agreements with foreign

countries.[5] With regard to each type of information, the Ninth Circuit criticized the government for failing in the *Vaughn* index adequately to describe the specific damage to national security that would result from disclosure of each document. App., *infra*, 10a-14a. In the absence of such specificity, the court believed, the requester would be unable "to contest the withholding agency's conclusion that disclosure will result in damage to the nation's security." *Id.* at 10a.

In the court's view, the government had also failed, for the most part, to justify its Exemption 3 claims. Exemption 3 shields from disclosure matters "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). The FBI invoked Exemption 3 to withhold documents that it claimed were protected from disclosure under 8 U.S.C. 1202(f), which shields "records * * * pertaining to the issuance or refusal of visas"; 26 U.S.C. 6103, which shields tax return information; and 50 U.S.C. 403(d)(3) and 403g, which protect Central Intelligence Agency "sources and methods from unauthorized disclosure." As to the three documents withheld under 8 U.S.C. 1202(f), the court ruled that the government should have revealed that the withheld documents "concerned a foreign citizen's request for a temporary waiver of certain visa requirements, and included the investigating official's recommended disposition of the request." App., *infra*, 15a. In its initial opinion, the court similarly concluded that the government could have explained that a portion of one tax document withheld under 26 U.S.C. 6103 "contained a brief reference to a then-pending tax fraud investigation of an individual and the individual's attorney arising out of a tax audit." *Wiener* v. *FBI*, No. 88-5867 (9th Cir. July 12, 1991),

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[5] The documents withheld under FOIA Exemption 1 were classified pursuant to Executive Order 12,356, which authorizes classification of documents "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Exec. Order No. 12,356 § 1.1(a)(3), 3 C.F.R. 166, 167 (1983).

slip op. 8763.[6] Finally, the court held that the government had not adequately justified withholding part of one document claimed to contain CIA information. App., *infra*, 18a.[7]

The government also withheld law enforcement records under Exemptions 7(C) and 7(D).[8] As to the Exemption 7(C) withholdings, respondent contested "only the relatively few withholdings in which entire documents or paragraphs have been withheld to protect the privacy interests of persons whose names appear somewhere in the withheld material." App., *infra*, 19a. The court held that "[w]ith respect to these withholdings, * * * the FBI's affidavits [were] inadequate" (*ibid.*) because ad-

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[6] The court of appeals subsequently amended this portion of its opinion to conclude, with respect to the withheld tax information, that the government's *Vaughn* index "could not disclose more than it did." App., *infra*, 16a. The amendment occurred after the government filed a petition for rehearing pointing out that, in describing the information that the court believed the government should have disclosed regarding the tax document, the court had actually gone so far as to reveal confidential taxpayer information. Gov't C.A. Reh'g Pet. 15. Needless to say, the court's amendment of its opinion locked the barn door after the horse had escaped—or, more accurately, been shoved out of the barn.

[7] The court of appeals (App., *infra*, 18a n.19) "decline[d] to follow" *Knight* v. *CIA*, 872 F.2d 660, 664 (1989), cert. denied, 494 U.S. 1004 (1990), in which the Fifth Circuit held that, under *CIA* v. *Sims*, 471 U.S. 159 (1985), an intelligence agency's determination to withhold information under 50 U.S.C. 403(d)(3) cannot be "second guess[ed]" by the reviewing court in a FOIA suit "in the absence of evidence of bad faith."

[8] FOIA Exemption 7, 5 U.S.C. 552(b)(7), in pertinent part exempts from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source * * *, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source. * * *

ditional details could have been provided "[w]ithout compromising privacy interests" (*id.* at 20a).

To illustrate that holding, the court then described the information that the index should have revealed about two documents, HQ-8 and NY-88. The government had withheld information from those two documents under both Exemption 7(C) and Exemption 7(D), on the grounds that the information in each document could reasonably be expected to cause an unwarranted invasion of personal privacy, and, in addition, constituted information provided by a confidential source in the course of a criminal investigation. According to the court,

> the FBI could have stated that HQ-8 recites information provided by a third party to an FBI informant detailing the third party's knowledge of several activists and protest activities planned at the 1972 Republican National Convention, discussing the possibility that John Lennon would organize a series of concerts to raise money to finance the activity, and describing rivalries and jealousies within activist organizations.

App., *infra*, 19a-20a (footnote omitted). The Court similarly ruled that

> the FBI could have stated that document NY-88 describes a series of meetings between a third person and various activists, discusses contests over the leadership of activist groups and complaints that activist leaders receive more publicity than the groups themselves, and reports tangential information about activist leaders, such as their habits of personal hygiene and the peculiar behaviors of their pets.

Id. at 20a. The court did not consider whether its own descriptions of the details that the government should have provided actually disclosed information exempt from disclosure under Exemption 7(D). Elsewhere, however, the court recognized that Exemption 7(D) protects information furnished by a confidential source in the course of a criminal investigation, regardless whether that information identifies the source. App., *infra*, 28a n.30.

In addition, the court faulted the government for "fail[ing] to explain with sufficient specificity the 'law enforcement purposes,' 5 U.S.C. 552(b)(7), underlying its investigation of John Lennon." App., *infra*, 23a. The government had explained that Lennon was under investigation for possible violations of the Civil Obedience Act of 1968 and the Anti-Riot Act because of his association with a radical group connected with acts of violence at the 1968 Democratic National Convention. App., *infra*, 23a & n.26. The court found that this explanation did not establish a "rational nexus" (*id.* at 23a) between the FBI's law enforcement duties and the withheld documents, because it did not describe "the kinds of criminal activity of which John Lennon was allegedly suspected" (*id.* at 24a).

The court further determined that the government had not adequately justified its withholdings under Exemption 7(D). "The most obvious flaw," in the court's view, was the FBI's "failure to state whether the purported grant of confidentiality in each case was express or implied." App., *infra*, 25a. While acknowledging that "[a]n express grant of confidentiality is virtually unassailable" (*ibid.*), the court held that an implicit grant of confidentiality could be established for each source only by an explanation of "the circumstances surrounding the receipt of information which led the FBI to conclude the informant would not have given the information without an implicit assurance of confidentiality" (*id.* at 26a). The court believed that such an explanation would enable the requester to "argue [that] no inference of confidentiality was justified." *Ibid.*

c. Finally, the court of appeals held that the district court did not make adequate written findings of fact and conclusions of law. App., *infra*, 28a-30a. The district court was instructed on remand to "state in reasonable detail the reasons for its decision as to each document in dispute" and to make specific findings regarding segregability. *Id.* at 29a (internal quotation marks omitted).

The panel concluded by stating its determination to "retain jurisdiction over all subsequent appeals." *Id.* at 31a.[9]

4. The government filed a petition for rehearing with a suggestion for rehearing en banc, asking the court to reconsider the new requirements it had adopted for *Vaughn* indices. The government pointed out that, in describing what the FBI's indices should contain, the court had in several instances actually disclosed sensitive information exempt from FOIA disclosure. One month later, the panel amended its opinion to delete one such instance, relating to withheld tax information. See note 6, *supra*.

Subsequently, the government brought the Seventh Circuit's decision in *Silets v. United States Dep't of Justice*, 945 F.2d 227 (1991) (en banc), petition for cert. pending, No. 91-1133, to the attention of the court of appeals. In *Silets*, the Seventh Circuit upheld the district court's entry of summary judgment for the government in a FOIA case, based upon *Vaughn* indices with coded notations similar to those submitted to the district court in this case. The Ninth Circuit denied rehearing. App., *infra*, 39a-40a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has devised a new rule of FOIA litigation that imposes a staggering burden on the government, prevents district courts from choosing the most efficient way to adjudicate FOIA cases, and greatly alters the substantive requirements for invoking several FOIA exemptions. The Ninth Circuit's new rule requires the government in virtually every FOIA case to prepare a *Vaughn* index so detailed as to all but disclose the information claimed as exempt, regardless whether such detail is relevant to the legal requirements of a particular claimed exemption. The court of appeals' rule—and the court's corresponding restriction on the discretion of district

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[9] The court of appeals declined to address respondent's claim that summary judgment was inappropriate because certain documents raised a triable issue as to whether the documents withheld under Exemptions 7(C) and 7(D) were compiled for law enforcement purposes. App., *infra*, 30a-31a.

courts to conduct *in camera* review—cannot be reconciled with FOIA, and squarely conflicts with decisions of other courts of appeals. Moreover, in applying its maximum-detail standard to the exemption claims in this case, the Ninth Circuit has adopted new substantive requirements of FOIA law that conflict with this Court's decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989), and decisions of other courts of appeals.

The decision below defies this Court's emphasis in *Reporters Committee* and other decisions on the need for "workable rules" in the administration of FOIA. The Ninth Circuit's own application of its new rule demonstrates the unworkability of the rule, as the court actually disclosed exempt information in four instances. Furthermore, the Ninth Circuit's new regime for FOIA litigation threatens an immediate and devastating drain on the considerable agency resources already devoted to processing and litigating FOIA claims. The problem is particularly acute for agencies such as the FBI and the IRS, which are defendants in approximately 50 FOIA lawsuits pending in the Ninth Circuit, some of which involve tens of thousands of pages of disputed documents.

For these reasons, plenary review is warranted.

1. The Ninth Circuit has adopted a standard of specificity for *Vaughn* indices that is wholly divorced from FOIA and that conflicts with every other court of appeals decision that has addressed the requirements for *Vaughn* indices. FOIA does not require submission of a *Vaughn* index, nor does it require that any other particular procedure be followed in actions to compel agency disclosure of documents. Instead, FOIA simply requires courts to make a *de novo* determination of whether the documents at issue should be disclosed. 5 U.S.C. 552(a)(4)(B). In fact, the only provision in FOIA that addresses litigation procedure grants discretion to the district courts to make the required *de novo* determination by conducting *in camera* review: "[T]he court * * * may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be with-

held under any of the [FOIA] exemptions * * *." 5 U.S.C. 552(a)(4)(B). The statute does not condition the exercise of this discretion on the submission of a *Vaughn* index, or in any other way.

The *Vaughn* index is a procedural tool that courts have developed to enable them to make the *de novo* determination required under FOIA without having to examine the individual documents at issue. The device was first proposed by the D.C. Circuit in *Vaughn* v. *Rosen*, 484 F.2d 820, 827 (1973), cert. denied, 415 U.S. 977 (1974), as a way to ensure that "allegations of exempt status are adequately justified." *Id.* at 826. The purpose of the index is "to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.'" *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn* v. *Rosen*, 484 F.2d at 826).

Subsequent to *Vaughn*, and prior to this case, the courts of appeals have uniformly recognized that the *Vaughn* index is only a judicially created means for achieving a statutory objective. For example, the courts have made clear that the index is not a required element of FOIA litigation:

> A court's primary focus must be on the substance, rather than the form, of the information provided by the government to justify withholding requested information. The government must provide evidence that enables the court to make a reasoned, independent assessment of the claim of exemption. Whether that evidence comes in the form of an *in camera* review of the actual documents, something labelled a 'Vaughn Index,' a detailed affidavit, or oral testimony cannot be decisive.

Vaughn v. *United States*, 936 F.2d 862, 867 (6th Cir. 1991); accord *Church of Scientology* v. *United States Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979) (government need not use a *Vaughn* index to justify its withholdings, as long as the court has enough evidence "to make an independent assessment of the government's claim of exemption"); cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 (1973) (various

"tool[s]" are available to district courts in FOIA litigation). The courts have also consistently refused to prescribe a rigid format for the index. As the D.C. Circuit has emphasized, "it is the function, not the form, of the index that is important." *Keys* v. *United States Dep't of Justice*, 830 F.2d 337, 349 (1987). Accord *Hinton* v. *Department of Justice*, 844 F.2d 126, 129 (3d Cir. 1988) ("There is no set formula for a *Vaughn* index."); *Lame* v. *United States Dep't of Justice*, 654 F.2d 917, 922 (3d Cir. 1981).

In stark contrast to these decisions, the decision below treats the *Vaughn* index as an end in itself. Here, the Ninth Circuit has required the submission of additional *Vaughn* indices even though the district court has already reviewed the documents themselves. The submission of additional indices at this stage does not serve to "permit the court system effectively and efficiently to evaluate the factual nature of disputed information." *John Doe Agency*, 493 U.S. at 149 n.2. The Ninth Circuit's decision to require additional indices at this point—without so much as hinting that the district court erred on the merits—mandates procedure for the sake of procedure.

In this respect, the decision below is unprecedented. We are not aware of any other court of appeals that has required the submission of additional *Vaughn* indices after a district court has reviewed the documents themselves *in camera*. On the contrary, the cases hold that district courts have discretion to order *in camera* review when *Vaughn* indices are inadequate.[10]

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[10] See, *e.g.*, *Lam Lek Chong* v. *United States Drug Enforcement Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991); *King* v. *United States Dep't of Justice*, 830 F.2d 210, 225 (D.C. Cir. 1987); *Donovan* v. *FBI*, 806 F.2d 55, 59 (2d Cir. 1986); *Ingle* v. *United States Dep't of Justice*, 698 F.2d 259, 267-268 (6th Cir. 1983). See also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 358, 381-382 (1976) (court of appeals properly ordered district court to conduct *in camera* review of disputed documents upon concluding that the agency failed to justify its withholdings "by means of affidavits or testimony"). The Ninth Circuit held in a previous case that, once the district court had reviewed the declarations and documents *in camera*, the only question on appeal is whether the district court's decision was

2. More is involved here than a matter of FOIA litigation procedure. The Ninth Circuit formulated onerous substantive FOIA requirements in the course of illustrating its maximum-detail standard for *Vaughn* indices. These substantive requirements conflict with this Court's decision in *Reporters Committee* and decisions of other courts of appeals. In addition, several of the Ninth Circuit's examples of the requisite specificity actually disclose exempt information, thereby vividly illustrating the serious risks inherent in its approach.

a. Under Exemption 7(C), the FBI withheld information about third parties who are mentioned in the FBI's criminal investigative files. The information withheld indicates that these third parties were the subjects of FBI investigations or connected to an FBI investigation in some other way. The government argued that such information is exempt under Exemption 7(C) because, by its nature, its disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

In rejecting that argument, the Ninth Circuit held that "[t]he privacy interest of third persons whose names appear in FBI files, the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances." App., *infra*, 22a. On this basis, it further held that the FBI's *Vaughn* indices were inadequate to justify the Exemption 7(C) claims because they did not "provide the FOIA requester with the information necessary to contest the [FBI's] conclusion" that privacy interests outweighed the public interest in disclosure. App., *infra*, 19a. Accordingly, the Ninth Circuit required

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clearly erroneous or founded upon an erroneous legal premise. *National Wildlife Fed'n* v. *United States Forest Serv.*, 861 F.2d 1114, 1116 (1988) ("Because the district judge properly inspected the documents involved in this case *in camera*, the parties do not, and reasonably could not, dispute that [the district judge had an adequate factual basis for his decision]."); see also *Church of Scientology*, 611 F.2d at 743 ("*in camera* inspection may supplement an otherwise sketchy set of affidavits").

the government on remand to provide enough details in its index to permit respondent to argue, with respect to each withholding in each document, that the third party's interest in privacy was outweighed by the public interest in disclosure. *Id.* at 18a-23a.

The substantive holding on Exemption 7(C) that underlies the Ninth Circuit's new *Vaughn* index rule conflicts with this Court's decision in *Reporters Committee.* In *Reporters Committee,* this Court reiterated the strong privacy interests of private citizens in the nondisclosure of criminal investigatory records about themselves; it held "as a categorical matter" that law enforcement records (in that case, criminal arrest records) about a private citizen should be withheld under Exemption 7(C). *Reporters Committee,* 489 U.S. at 780. The Court further held that application of Exemption 7(C) does not require ad hoc balancing of private and public interests on a case-by-case basis. 489 U.S. at 778-779.[11] This Court in *Reporters Committee* thus rejected the very type of individualized balancing that the Ninth Circuit here held the *Vaughn* index must permit.[12]

The Ninth Circuit's holding on Exemption 7(C) also brings it into direct conflict with the D.C. Circuit and

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[11] The Court in *Reporters Committee* found support for its categorical approach to Exemption 7(C) claims in the legislative history of the 1986 amendments to FOIA, which amended Exemption 7(C) "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." 489 U.S. at 777 n.22.

[12] Similarly, in *United States Dep't of State* v. *Ray,* 112 S. Ct. 541, 547-550 (1991), the Court made a categorical determination that FOIA Exemption 6 protected from disclosure the names and addresses of Haitians who had been returned to Haiti after fleeing that country and had subsequently been interviewed by the State Department. The Court in *Ray* did not engage in an ad hoc balancing of each individual interviewee's privacy interest, as against the public interest in disclosure, even though it recognized that "the Government's burden in establishing the requisite invasion of privacy to support an Exemption 6 claim is heavier than the standard applicable to Exemption 7(C)." *Id.* at 546. The individualized ad hoc balancing that the Ninth Circuit would require in this case cannot be reconciled with this Court's analysis in *Ray.*

the Eleventh Circuit. In *SafeCard Servs., Inc.* v. *Securities and Exchange Comm'n*, 926 F.2d 1197, 1206 (1991), the D.C. Circuit relied on *Reporters Committee* to hold, "categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." See also *Keys* v. *United States Dep't of Justice*, 830 F.2d 337, 347 (D.C. Cir. 1987) (rejecting the plaintiff's argument that the government must identify "the individual privacy interests implicated by the specific documents" and approving *Vaughn* index's categorical descriptions of documents withheld under Exemption 7(C)).

Similarly, in *Nadler* v. *United States Dep't of Justice*, No. 90-5420 (Mar. 23, 1992), the Eleventh Circuit held that Exemption 7(C) categorically protects the names of persons interviewed by the FBI during a criminal investigation. The district court in *Nadler* had "requir[ed] the Government to make a separate showing as to the applicability of Exemption 7(C) to each particular person identified in its records." *Nadler*, slip op. 1695. The Eleventh Circuit rejected that approach, ruling that "the district court erred in failing to apply the broader holding of *Reporters Committee*—where the public and privacy interests that affect the balancing under Exemption 7(C) are the same for all the information withheld, the Government's proof applies equally to all the contested records." *Id.* at 1696. The court of appeals in *Nadler* determined that, for third parties mentioned in FBI records in connection with an investigation, "the privacy interest is identical * * * [and] the public interest in disclosure * * * is the same for each name." *Ibid.* After categorically balancing those interests, it concluded that privacy interests outweighed the public interest. *Id.* at 1696-1698.

What is more, in illustrating the level of detail necessary to justify an Exemption 7(C) claim, the Ninth Circuit disclosed information that is itself exempt from

disclosure under Exemption 7(D). Exemption 7(D) protects information provided by a confidential source during a criminal investigation. 5 U.S.C. 552(b)(7)(D). The Ninth Circuit recognized that such information is exempt from disclosure, regardless whether it reveals the identity of the confidential source. App., *infra*, 28a n.30. The court nonetheless provided just such information in describing what the FBI should have disclosed about documents HQ-8 and NY-88. *Id.* at 19a-21a. Thus, in illustrating the level of detail required under its new standard, the Ninth Circuit graphically illustrated the risks inherent in that standard.

b. The Ninth Circuit held that, in order to justify withholding information provided under an implicit assurance of confidentiality pursuant to Exemption 7(D), the FBI's index must specify "the circumstances surrounding the receipt of information which led the FBI to conclude the informant would not have given the information without an implicit assurance of confidentiality." App., *infra*, 26a. In describing how the FBI must revise the *Vaughn* index, the Ninth Circuit enunciated an erroneous substantive requirement for Exemption 7(D) claims.

The Ninth Circuit's holding on Exemption 7(D) brings it again into direct conflict with the D.C. Circuit, as well as with other courts of appeals. In *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 577 (1990), the D.C. Circuit adopted "close to an irrebuttable" presumption that information provided by third parties to the FBI in a criminal law enforcement investigation had been provided in confidence and was therefore exempt from disclosure under Exemption 7(D). The D.C. Circuit emphasized that, in doing so, it was "merely following the direction [this] Court gave us in *Reporter's Committee*." *Dow Jones*, 917 F.2d at 577. It explained that "such a strong presumption" obviated a source-by-source inquiry into whether confidentiality has been implicitly assured. *Ibid.*; see also *Schmerler* v. *FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990). At least four other circuits have similarly held that the government need not demonstrate

an implicit assurance of confidentiality on a source-by-source basis in order to prove an Exemption 7(D) claim. See *Nadler*, slip op. 1693-1694; *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204, 207-208 (7th Cir. 1985); *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984); *Donovan* v. *FBI*, 806 F.2d 55, 61 (2d Cir. 1986); see also *Irons* v. *FBI*, 880 F.2d 1446, 1447 (1st Cir. 1989) (en banc); *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Pope* v. *United States*, 599 F.2d 1383, 1386-1387 (5th Cir. 1979). But see *Landano* v. *United States Dep't of Justice*, No. 91-5161 (3d Cir. Feb. 11, 1962), petition for rehearing en banc pending (filed Mar. 26, 1992).

3. The Ninth Circuit's entire approach in this case flies in the face of this Court's efforts to develop "workable rules" for FOIA litigation. See *Reporters Committee*, 489 U.S. at 779; *FTC* v. *Grolier Inc.*, 462 U.S. 19, 27-28 (1983); *Department of the Air Force* v. *Rose*, 425 U.S. at 381-382; see also S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966). The Ninth Circuit's approach (1) requires the government in virtually every case to submit a *Vaughn* index that maximizes the FOIA plaintiff's ability to argue for disclosure; and (2) prohibits district courts from resorting to *in camera* inspection until the *Vaughn* index satisfies the maximum-detail standard.[13] This new procedural regime is unworkable.

First, the Ninth Circuit's approach poses a serious risk of unlawful disclosures. As we explained above, in illustrating the level of detail required to justify a claim under Exemption 7(C), the court twice disclosed information that was exempt from disclosure under Exemption 7(D). In two other instances, the court likewise revealed exempt information. The court stated that, to

[13] The court of appeals recognized that no *Vaughn* index is required when there is no dispute over the factual nature of the documents. App., *infra*, 4a n.5. That exception seldom applies, however, because "[i]n many, if not most, disputes under the FOIA, resolution centers around the factual nature * * * of the information sought." *Vaughn* v. *Rosen*, 484 F.2d at 823.

justify a claim under Exemption 3, the FBI should have divulged that "the withheld [visa] records concerned a foreign citizen's request for a temporary waiver of certain visa requirements, and included the investigating official's recommended disposition of the request." App., *infra*, 15a. The court's description of the withheld visa documents revealed information protected from disclosure under 8 U.S.C. 1202(f), which accords "confidential" treatment to "records * * * pertaining to the issuance or refusal of visas or permits to enter the United States." In the context of this case, there can be little doubt about the identity of the "foreign citizen" to whom the court referred, App., *infra*, 15a. For a similar reason, it is clear that the court disclosed confidential taxpayer information when it stated in its initial opinion that the government should have revealed that "[a] withheld document contained a brief reference to a then-pending tax fraud investigation of an individual and the individual's attorney arising out of a tax audit." *Wiener* v. *FBI*, No. 88-5867 (9th Cir. July 12, 1991), slip op. 8763. Although the Ninth Circuit later amended its opinion to delete the tax-document example, that does not dispel the risk that, in future cases or on remand in this case, the district courts will make unlawful disclosures when they attempt to apply the Ninth Circuit's maximum-detail standard.[14]

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[14] The court's examples of the requisite specificity illustrate another unworkable aspect of the court's approach. It is by no means clear how district courts can apply the court of appeals' maximum-detail standard without conducting *in camera* review. The court of appeals clearly relied on *in camera* review in formulating its examples of the information that the government should have disclosed in the *Vaughn* index. Similarly, the district court undertook *in camera* review in response to respondent's "Motion to Compel Preparation of Adequate *Vaughn* Index" (CR 12). The district court then "carefully compared those [public declarations] that have been filed and served on plaintiff's counsel with those that have been submitted for the court's *in camera* inspection." CR 33. Thus, under the court of appeals' approach, courts will often have to conduct *in camera* review to determine the adequacy of a *Vaughn* index. Yet the very purpose of the *Vaughn* index is to save courts from

Moreover, efforts by lower courts to apply the Ninth Circuit's standard will breed pointless litigation over the adequacy of *Vaughn* indices. Again, this case is illustrative. The Ninth Circuit did not express any doubt that the district court had an adequate factual basis upon which to make a *de novo* determination, and no doubt on that score is possible, given the district court's *in camera* review. Nor did the Ninth Circuit review the district court's ruling on the merits, finding that it would be "premature" to do so. App., *infra*, 31a; see also *id.* at 9a n.11.[15] As a result, a further round of district court litigation will be necessary, and possibly a further appeal, in which the panel may again conclude that review of the merits is "premature." [16]

In addition to the burden placed on courts, the Ninth Circuit's decision places an intolerable burden on the government. It will require virtually unlimited manpower and ingenuity for agencies to prepare *Vaughn* indices that meet the maximum-detail standard.[17] As agencies

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having to conduct *in camera* review. See *Vaughn* v. *Rosen*, 484 F.2d at 825.

[15] The court of appeals held that the district court did not make adequate written findings of fact and conclusions of law. App., *infra*, 28a-30a. That holding was plainly influenced by the court of appeals' erroneous view as to the level of specificity required to justify withholding. The district court clearly identified both the factual and legal basis for its grant of summary judgment and established that a careful *de novo* review had taken place. A remand was therefore unnecessary on this issue, especially in light of the court of appeals' independent review of the record. See, *e.g.*, *McCord* v. *Bailey*, 636 F.2d 606, 613 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981).

[16] As previously noted, the panel has retained jurisdiction "over all subsequent appeals." App., *infra*, 31a.

[17] The FBI estimates that preparation of the maximum-detail *Vaughn* index required by the Ninth Circuit in this case will require an additional 1300 hours of work. In another Ninth Circuit FOIA case involving the FBI, *Lyman D. Spurlock* v. *FBI*, No. CV-91-5602-R (C.D. Cal.), the FBI estimates that more than 900 additional hours

struggle to do so, they must walk an extremely fine line, specifying as much detail as possible without revealing information that is exempt from disclosure. In short, the Ninth Circuit's decision forces agencies to practice perpetual brinksmanship in FOIA litigation.[18] As we have explained, nothing in the text of FOIA or in FOIA case law requires this result.

4. The Seventh Circuit's recent decision in *Silets* v. *United States Dep't of Justice*, 945 F.2d 227 (1991) (en banc), petition for cert. pending, No. 91-1133, represents the proper approach to appellate review of the manner in which a district court has conducted a FOIA case. The requester in *Silets* sought Department of Justice records on wiretap surveillance of Jimmy Hoffa. The

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of work will be required to prepare the maximum-detail *Vaughn* index that the district court, relying on the decision below, has ordered. A similar order has been entered against the FBI in *Church of Scientology* v. *FBI*, No. 90-2048-WMB (C.D. Cal.), and will presumably require a comparable expenditure of additional agency resources. There are 13 other FOIA lawsuits against the FBI pending in district courts in the Ninth Circuit. Moreover, in at least two FOIA cases pending in the Ninth Circuit against the Internal Revenue Service, district courts have relied on the decision below to order the IRS to submit additional, maximum-detail *Vaughn* indices. *Author Servs., Inc.* v. *Internal Revenue Serv.*, Civ. No. 90-2187-RSWL (C.D. Cal. filed May 1, 1990); *Church of Scientology* v. *Internal Revenue Serv.*, Civ. No. 89-4504-CBM (C.D. Cal. filed July 28, 1989). The IRS estimates that preparation of the additional index required in the latter case will consume 600 attorney-hours in addition to the 900 hours spent in preparing the previous index. The IRS is a defendant in a total of approximately 40 FOIA lawsuits pending in the Ninth Circuit, and is understandably concerned that similar additional expenditures of time and resources will be required in many of these other cases as a result of the decision below.

[18] The burden imposed by the Ninth Circuit's decision is particularly acute for agencies such as the FBI and the IRS, which receive thousands of FOIA requests every year. By way of example, more than 19,000 FOIA requests were filed or reopened with the FBI during calendar year 1991; the IRS received more than 27,000 requests over that period. As of the end of fiscal year 1991, there were more than 250 FOIA lawsuits pending against the FBI nationwide.

Department withheld, *inter alia*, information concerning surveillance of third parties and symbols designating confidential sources. In the ensuing litigation, the government submitted two *Vaughn* indices that described the withholdings with a level of detail comparable to the level of detail employed in the public *Vaughn* indices submitted in the present case. The district court in *Silets* denied the plaintiff's motion for *in camera* inspection and entered judgment in favor of the government based on the *Vaughn* indices. The Seventh Circuit affirmed, holding that the district court had not abused its discretion by refusing to review the documents *in camera*. The court of appeals determined that the *Vaughn* indices provided an adequate factual basis for the district court's ruling because they "(1) describe[d] the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate[d] that the information withheld falls logically within the claimed exemption, and (3) [were] not controverted by either contrary evidence in the record or by evidence of bad faith." *Silets*, 945 F.2d at 229 (quoting *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204, 210 (7th Cir. 1985)).

The Ninth Circuit's approach in the present case is fundamentally at odds with the Seventh Circuit's approach in *Silets*.[19] For one thing, the *en banc* court in *Silets* recognized that district courts are "in the best position" to determine the most efficient way of conducting FOIA litigation. 945 F.2d at 231. Here, in contrast, the Ninth Circuit accorded no discretion to the district court in that matter. Moreover, the court in *Silets* refused to look behind the government's affidavits merely because the plaintiff alleged government wrongdoing in the investigation of Hoffa. *Ibid.* The court thus accorded the affidavits "a presumption of legitimacy,"

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[19] Simultaneously with the filing of this petition, we are filing our response to the petition for a writ of certiorari in *Silets*, in which we acquiesce in the granting of the petition. We have provided counsel in this case with a copy of our response in *Silets*.

United States Dep't of State v. *Ray*, 112 S. Ct. at 550. Plainly, no such presumption was applied by the Ninth Circuit in this case. Most importantly, the Seventh Circuit's assessment of the *Vaughn* indices—and of the need, if any, for *in camera* inspection—was properly founded upon the district court's statutory duty to make a *de novo* determination. *Silets*, 945 F.2d at 228-229. As we discussed above, the Ninth Circuit's analysis of these issues was utterly divorced from FOIA's provisions.

5. The issues presented in this case are of vital importance to the efficient conduct of FOIA litigation. Virtually every FOIA case involves use of a *Vaughn* index or *in camera* review, or both. As discussed above, the Ninth Circuit's decision hinders courts from using the index as a means of "effectively and efficiently * * * evaluat[ing] the factual nature of disputed information." *John Doe Agency*, 493 U.S. at 149 n.2. The decision also drastically curtails the discretion of district courts to conduct *in camera* review. This Court has recognized the need for "workable rules" to govern substantive issues of FOIA law. See, *e.g.*, *Reporters Committee*, 489 U.S. at 779. So too, workable rules are needed to govern the manner in which FOIA litigation is conducted. Cf. *Department of the Air Force* v. *Rose*, 425 U.S. at 381.[20] Plenary review is necessary to correct the unworkable rule adopted by the court of appeals.

We recognize that the government could prevail on remand in this case, but for three reasons we do not believe that this possibility counsels against review by this Court. First, this Court has previously granted certiorari to review FOIA issues in cases in a similar posture. *Reporters Committee*, 489 U.S. at 760 (court

[20] In *Grolier*, the Court stressed that workable rules are necessary, *inter alia*, to further FOIA's purpose "of expediting disclosure." 462 U.S. at 28. That purpose is plainly frustrated under the procedural regime developed by the Ninth Circuit in this case, which will divert agency resources away from the processing of FOIA requests in order to satisfy the court's maximum-detail standard for *Vaughn* indices.

of appeals remanded for determination of whether information in "rap" sheets was available from sources other than the Department of Justice, and, if so, whether the Department could fulfill its FOIA obligations by referring the plaintiff to those sources); *Administrator, Federal Aviation Admin.* v. *Robertson*, 422 U.S. 255, 259-260 (1975) (after rejecting FAA's claim under FOIA Exemption 3, court of appeals remanded for determination of whether FAA reports were exempt under Exemptions 4, 5, or 7); see also *Department of the Air Force* v. *Rose*, 425 U.S. at 358 (court of appeals remanded, instructing district court to review *in camera* case summaries of honor and ethics hearing and to delete identifying information).

Second, the published decision of the court of appeals imposes both a significant risk and an enormous burden on the government in pending and future FOIA cases. As we discussed above, in the course of illustrating its maximum-detail standard, the court of appeals divulged information protected from disclosure by statute. If other courts follow this example, the government will confront the risk of unlawful disclosures in other cases. Quite apart from that risk, the court of appeals' maximum-detail standard will greatly increase the time and resources required to prepare *Vaughn* indices in pending and future cases.[21]

Third, as we have explained, the Ninth Circuit's decision conflicts with decisions of this Court and decisions of other courts of appeals on several issues, each of which frequently arises in FOIA litigation and warrants uniform resolution.

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[21] Federal agencies are currently named defendants in approximately 165 FOIA lawsuits pending in district courts in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 88-5867

JONATHAN M. WIENER, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION; FEDERAL BUREAU OF INVESTIGATION, LOS ANGELES FIELD OFFICE; FEDERAL BUREAU OF INVESTIGATION, NEW YORK FIELD OFFICE; FEDERAL BUREAU OF INVESTIGATION, DETROIT FIELD OFFICE, DEFENDANTS-APPELLEES

Argued and Submitted Dec. 5, 1989

Decided July 12, 1991

As Amended Sept. 26, 1991

Appeal from the United States District Court
for the Central District of California

Before BROWNING, SCHROEDER and FERGUSON, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

Professor Jonathan M. Wiener, Professor of History at the University of California, Irvine, filed a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988), for disclosure of

records of the Federal Bureau of Investigation concerning John Lennon, late member of the Beatles. Professor Wiener sought to further his research into John Lennon's life,[1] and to bolster his thesis that the investigation of Mr. Lennon by the FBI in the late 1960's and early 1970s reflected the use of executive agency power to suppress political dissent.

The FBI withheld some of the requested records as exempt from disclosure by the terms of the Act.[2] Weiner filed this action to compel complete disclosure and moved to require the FBI to explain why each document withheld was exempt. In response, the FBI filed affidavits of two FBI agents and one CIA agent justifying the withholdings in general terms. The district court ordered the FBI to submit *in camera* further justification for the withholdings. The FBI filed two additional affidavits and a copy of each withheld document.[3] The court then granted the FBI's motion for summary judgment.

Wiener appealed contending: (1) the public affidavits were inadequate; (2) the district court's findings of fact and law were insufficient; and (3) there

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[1] Professor Wiener authored *Come Together: John Lennon In His Time* (Random House 1984), a study of Mr. Lennon.

[2] Exemptions were claimed under § 552(b)(1) (properly classified information), § 552(b)(2) (documents related solely to the internal practices of an agency), § 552(b)(3) (documents exempted from disclosure by statute), § 552(b)(7)(C) (information compiled for law enforcement purposes if the release would constitute an unwarranted invasion of personal privacy), and § 552(b)(7)(D) (information compiled for law enforcement purposes if the release would disclose the identity of a confidential source). Wiener has not appealed the withholdings under § 552(b)(2).

[3] Wiener was not permitted to examine these *in camera* submissions.

were triable issues of fact with respect to the propriety of the claims of exemption. We agree with Wiener's first two contentions and reverse. We do not find it necessary to reach Wiener's third claim.

I

Ordinarily, rules of discovery give each party access to the evidence upon which the court will rely in resolving the dispute between them. In a FOIA case, however, because the issue is whether one party will disclose documents to the other, only the party opposing disclosure will have access to all the facts. *See King v. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir.1987); *Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C.Cir.1973).

"This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system[]." *Vaughn*, 484 F.2d at 824. The party requesting disclosure must rely upon his adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding agency's arguments. It is simply "unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case." *Id.* at 825.

In recognition of this problem, government agencies seeking to withhold documents requested under the FOIA have been required to supply the opposing party and the court with a "*Vaughn* index," [4] identifying each document withheld, the statutory exemp-

[4] See, e.g., *Binion v. Dep't of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983); *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980); *King*, 830 F.2d at 218; *Vaughn*, 484 F.2d at 827.

tion claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption. *See King*, 830 F.2d at 223-24 (describing the content of a *Vaughn* index); *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C.Cir. 1977) (same). The purpose of the index is to "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *King*, 830 F.2d at 218. The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision.[5]

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[5] The role of the *Vaughn* index in enabling the adversary process to function in FOIA cases is universally recognized. *See, e.g., Vaughn*, 484 F.2d at 828; *Orion Research, Inc. v. EPA*, 615 F.2d 551, 553 (1st Cir. 1980); *Donovan v. FBI*, 806 F.2d 55, 58 (2d Cir. 1986); *Ferri v. Bell*, 645 F.2d 1213, 1222 (3d Cir. 1981) *modified on other grounds* 671 F.2d 769 (3d Cir. 1982); *Ingle v. Dep't of Justice*, 698 F.2d 259, 263 (6th Cir. 1983); *Stein v. Dep't of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Davis v. CIA*, 711 F.2d 858, 861 (8th Cir. 1983); *Ollestad v. Kelley*, 573 F.2d 1109, 1110 (9th Cir. 1978); *Ely v. FBI*, 781 F.2d 1487, 1492 (11th Cir. 1986); S. Rep. No. 854, 93d Cong., 2d Sess. 14-15 (1974).

Consistent with its purpose, a *Vaughn* index is not required where it is not needed to restore the traditional adversary process. Thus, in *Brown v. FBI*, 658 F.2d 71 (2d Cir. 1981), the Second Circuit held that a *Vaughn* index was not required because the FOIA requester had acquired sufficient facts to permit the adversary process to function. *Id.* at 74. Similarly, in *Lewis v. Internal Revenue Service*, 823 F.2d 375 (9th Cir. 1987), we held that a *Vaughn* index was not required because the entire class of documents requested was *per se* exempt from disclosure regardless of the content of each withheld document. *Id.* at 380. The government gained no advantage from access to material facts the FOIA requester lacked.

The district court required a *Vaughn* index in this case. In response to the court's order the FBI supplied the court and Wiener with the affidavits of three federal agents; the FBI later filed two additional public affidavits.[6] Whether the government's public affidavits constituted an adequate *Vaughn* index is a question of law reviewed *de novo*. *Binion v. Dep't of Justice*, 695 F.2d 1189, 1193 (9th Cir.1983). We conclude they did not.

The substance of the affidavits consisted of redacted copies of documents partially withheld and blacked out copies of documents withheld in their entirety, with one or more handwritten four digit codes written next to each withheld portion. The first two digits of each code identified the statutory exemption claimed by the FBI. For example, the notation "(b)(1)," is a reference to 5 U.S.C. § 552(b)(1) and indicates that the exemption for properly classified documents ("Exemption 1") was claimed. The next two digits of each code refer to one of a number of categories of information listed in the affidavits into which the withheld information allegedly fell. For example, "c3" refers to "detailed information pertaining to/or provided by an intelligence source." The affidavits list up to nine categories of information for each of the statutory exemptions claimed.

The affidavits then state in general terms why each category of information should be withheld. The explanation given for the withholding of "(b)(1) c3"

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[6] Affidavits were filed by Special Agents Robert J. Chester and Robert F. Peterson of the FBI, and Information Review Officer Louis J. Dube of the CIA. Brief supplementary affidavits were filed by Supervisory Special Agent Chris J. Flynn of the FBI and Lee E. Carle, Mr. Dube's successor at the CIA. We refer to these affidavits collectively as the *Vaughn index*.

information (detailed information provided by an intelligence source) is representative:

> Information of this category is *either* specific in nature *or* of a unique character, and thereby could lead to the identification of a source. *For example*, this information *may* contain details obtained from a one-on-one conversation between a source and another individual. It *may* be of such detail that it pinpoints a critical time frame *or* reflects a special vantage point from which the source was reporting. The information *may* be more or less verbatim from a source's report and thus reveal a style of reporting peculiar to that source along with other clues as to authorship, such as handwritten *or* typewritten reports of the informant. The nature of the information *may* be such that only a handful of parties would have access to it. It is the degree of specificity of this information that endangers the source's continued anonymity. . . .

(Emphasis added). Precisely the same explanation is given for each "(b) (1) c3" withholding.

These "boilerplate" explanations were drawn from a "master" response filed by the FBI for many FOIA requests.[7] No effort is made to tailor the explanation to the specific document withheld. Remarkably, in the original *Vaughn* index submitted by the FBI, John Lennon's name does not appear at all.[8] The ex-

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[7] The FBI's explanation for the withholding of information "Pertaining To Or Provided By An Intelligence Source . . ." in *King*, 830 F.2d at 223 n. 96, and the FBI's explanation for the withholding in this case, quoted above, are virtually identical.

[8] John Lennon's name does appear in the supplemental affidavit of Agent Flynn.

planations offered are precisely the sort of "[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" the D.C. Circuit properly rejected in *King* as "clearly inadequate." *King*, 830 F.2d at 224.

This categorical approach affords Wiener little or no opportunity to argue for release of particular documents. The most obvious obstacle to effective advocacy is the FBI's decision to state alternatively several possible reasons for withholding documents, without documents, without identifying the specific reason or reasons for withholding each particular document. Effective advocacy is possible only if the requester knows the precise basis for nondisclosure. *King*, 830 F.2d at 218-19. The agency may give alternative reasons for withholding a document only if each reason is applicable to the document at issue.

Moreover, the level of specificity in the index submitted in this case is insufficient. "Specificity is the defining requirement of the *Vaughn* index." *King*, 830 F.2d at 219; *see also Vaughn*, 484 F.2d at 827. Unless the agency discloses "as much information as possible without thwarting the [claimed] exemption's purpose," *King*, 830 F.2d at 224, the adversarial process is unnecessarily compromised. The FBI did not disclose all it could. Indeed, the index provides no information about particular documents and portions of documents that might be useful in contesting nondisclosure—the two principal affidavits of Agents Chester and Peterson make no reference to any particular document at all.

In camera review of the withheld documents by the court is not an acceptable substitute for an adequate *Vaughn* index. *In camera* review does not permit effective advocacy. *See Doyle v. FBI*, 722 F.2d 554,

556 (9th Cir.1983); *Vaughn*, 484 F.2d at 825. Therefore, resort to *in camera review* is appropriate only after "the government has submitted as detailed public affidavits and testimony as possible." *Doyle*, 722 F.2d at 556; *see also, Ingle v. Dep't of Justice*, 698 F.2d 259, 266 (6th Cir.1983) ("no court should consider *in camera* review if a Vaughn Index can adequately resolve the issue"). *In camera* review may supplement an adequate *Vaughn* index, but may not replace it.[9] *Cf. NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 98 S.Ct. 2311, 2318, 57 L.Ed.2d 159 (1978) ("*in camera* review . . . is designed to be invoked when the issue before the District Court could not be otherwise resolved").

In revising the *Vaughn* index on remand, the FBI must bear in mind that the purpose of the index is not merely to inform the requester of the agency's conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest.

We turn to a consideration of each of the four statutory exemptions claimed by the FBI in this case.[10]

A

Exemption 1: National Security

Exemption 1, 5 U.S.C. § 552(b)(1), permits the government to withhold documents and portions of

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[9] For this reason, the government's argument that the district court's *in camera* review of the withheld documents provided that court with a sufficient factual basis for its decision is inapposite.

[10] *See* supra note 2.

documents which have been properly classified pursuant to Executive Order. *Id.* The Executive Order currently in force authorizes the classification of documents "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Exec. Ord. 12356 § 1.1(a)(3), 3 C.F.R. 166, 167 (1983).[11] Though an executive agency's classification decisions are accorded substantial weight, the FOIA permits challenges to Exemption 1 withholdings, requires the district court to review the propriety of the classification, and places the burden on the withholding agency to sustain its Exemption 1 claims. *Abbots v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C.Cir.1985); *see also*, *Stein v. Dep't of Justice*, 662 F.2d 1245, 1256-59 (7th Cir.1981) (reviewing the propriety of the agency's classification decision). The government's

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[11] Many of the cases cited in this opinion were decided under Executive Order 12065 which governed classification decisions prior to the enactment of Executive Order 12356. We reject the government's argument that these cases, and in particular *King*, 830 F.2d 210, no longer have any relevance in light of the revised classification scheme. Regardless of the substantive standards for the classification of documents, it is still necessary for the withholding agency to produce an adequate *Vaughn* index to permit the adversary process to function.

The government relies specifically upon Exec. Ord. 12356 § 1.3(c), 3 C.F.R. at 169, declaring that the release of certain classes of information "is presumed to cause damage to the national security," to emphasize that the withholding of these classes of information is particularly important. Again, however, the issue before us is not the importance of witholding certain categories of classified information, or even the propriety of the classification of the withheld documents in this case; rather the issue is whether Wiener has been afforded an adequate opportunity to challenge the government's decision to classify. For the reasons stated above, we hold he has not.

affidavits did not provide Wiener with a reasonable opportunity to contest the Exemption 1 withholdings.

(1) *Confidential Source Information*

Many of the Exemption 1 withholdings were based on the FBI's conclusion that release of the withheld documents would damage national security by leading to the disclosure of a confidential source. *See* Exec. Ord. 12356 § 1.3(a)(9), 3 C.F.R. at 169 (information concerning confidential sources is subject to classification). As discussed in more detail in connection with the FBI's withholdings under Exemption 7D (relating specifically to confidential sources), the withholding agency must provide the court and the FOIA requester with information sufficient to determine whether the source was truly a confidential one and why disclosure of the withheld information would lead to exposure of the source. *See* infra at 986-987. Because the *Vaughn* index make no effort to do so, it is inadequate.

Moreover, merely showing the source was confidential and would be revealed by production of the withheld document, is not sufficient to sustain an Exemption 1 claim. In addition, Exemption 1 is available only if disclosure of the source "could reasonably be expected to cause damage to the national security." Exec. Ord. 12356 § 1.1(a)(3), 3 C.F.R. at 167. To justify an Exemption 1 claim, the *Vaughn* index must provide (to the extent permitted by national security needs) sufficient information to enable the requester to contest the withholding agency's conclusion that disclosure will result in damage to the nation's security.

The index in this case does not meet this standard. The index lists eight categories of information the

FBI asserts could expose a confidential source,[12] and a single explanation of the harm to national security that may flow from disclosure of a source's identity:

> Exposure of an intelligence source can result in termination of the source; discontinuance of the source's services; exposure of other ongoing intelligence gathering activities; modification or cancellation of future intelligence gathering activities; evaluation by hostile entities of the number and objectives of intelligence sources targeted against them, followed by appropriate countermeasures; and an overall chilling effect on the climate of cooperativeness with respect to the unwillingness of intelligence sources, both current and prospective, to risk the probability of exposure with its potential effect of possible loss of life, jobs, friends, status, etc., all of which can reasonably be expected to hamper intelligence collection ability and result in damage to the national security.

The index fails to tie the FBI's general concern about disclosure of confidential sources to the facts of this case. The index does not describe any particular withheld document, identify the kind of information found in that document that would expose the

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[12] Those categories are: (1) names and code-names, (2) information which reveals "the character or degree of source coverage or penetration," (3) detailed information pertaining to or provided by an intelligence source, (4) dates furnished by an intelligence source, (5) instructions for the dissemination of information, (6) the date or place of a contact between an intelligence source and his government contact, (7) the identity of the intelligence source's government contact, and (8) information about subsidiary investigations such as background checks.

confidential sources, or describe the injury to national security that would follow from the disclosure of the confidential source of the particular document. The FBI must have made such an analysis in concluding that disclosure of some informants or classes of informants would damage national security and disclosure of others would not.[13] Yet none of the information and analysis necessarily considered is made available to Wiener or the court.[14] The index simply relies on general assertions that disclosure of certain categories of facts may result in disclosure of the source and disclosure of the source may lead to a variety of consequences detrimental to national security.

(2) *Intelligence Activities and Methods*

The discussion in the affidavits of withholdings based on the exemption from disclosure of information related to intelligence activities and methods is particularly scanty.

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[13] It is clear the FBI has not concluded that the release of the identity of an informant *per se* damages national security. The FBI has concluded that the release of the name of the New York University official who told the FBI the University had offered John Lennon a teaching post would not damage national security. *See infra* at 987.

[14] For example, the index does not explain how the disclosure of the identity of individuals who assisted in the investigation of John Lennon will reveal to "hostile entities" the "number and objectives of intelligence sources targeted against them." Nor does the index provide any factual background for the conclusion that "[e]xposure of an intelligence source can result in termination of the source [or] discontinuance of the source's services." Most obviously, the district court needs to know whether the source is still useful as an informant, or even alive. *See King*, 830 F.2d at 221 n. 90.

We are once again given only a generalized, theoretical discussion of the possible harms which can result from the release of this category of information.[15] The FBI has again failed to state the specific harms which may result from the release of a particu-

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[15] The affidavit states:

> Disclosure of information concerning intelligence activities, sources or methods can result in damage to the national security in several ways. First, its disclosure could reveal the existence of a particular intelligence or counterintelligence investigation/operation. Disclosure could reveal or indicate the nature, objectives, requirements, priorities, scope or thrust of the intelligence or counterintelligence investigation/operation. Disclosure could identify data used in the acquisition and processing of intelligence or counterintelligence information, and such identification could reveal a particular intelligence interest, the value of the intelligence, or the extent of knowledge of a particular target of intelligence or counterintelligence interest. Disclosure could reveal a particular method used to obtain or process intelligence or counterintelligence information. Such disclosure would allow hostile entities' assessment of both general and specific intelligence collection capabilities during a particular time frame, and hostile assessment of areas and targets which may have been compromised or may not have been compromised; allow countermeasures to be implemented, making future intelligence operations more difficult, and would compromise other ongoing and planned intelligence operations.

This explanation leaves unanswered the following relevant questions, among others. Is it realistic to expect disclosure of a twenty year old investigation to reveal the existence of a current intelligence investigation? If so, why? Why is it reasonable to expect that the disclosure of documents from the investigation of John Lennon would reveal the objectives or priorities of current intelligence operations? Are the intelligence methods used in the investigation of John Lennon still used today, justifying continued secrecy?

lar document. The explanations are simply too broad to be of any use to Wiener, the district court, or this court.

(3) *Information about Foreign Relations and Governments*

The same is true of the FBI's discussion of information concerning foreign relations and foreign governments. Again, we are given broad explanations of alternative harms that might result from the release of the withheld information. No explanation is given why seemingly far-fetched harms, such as the FBI's claim that release of the withheld information will "[l]ead to . . . military retaliation against the United States," have any relevance to the particular documents withheld.

B

Exemption 3: Withholding Authorized by Another Statute

Exemption 3, 5 U.S.C. § 552(b)(3) (1988), authorizes the withholding of documents "specifically exempted from disclosure by statute" other than the FOIA itself. *Id.* The FBI relied upon four separate statutes to support its Exemption 3 withholdings.

(1) *Records Relating to Visa Applications*

The FBI relied upon 8 U.S.C. § 1202(f) (1988) in withholding three documents. Section 1202(f) provides that Department of State "records . . . pertaining to the issuance or refusal of [immigration] visas . . . shall be considered confidential." Section 1202(f) specifically exempts such documents from FOIA disclosure. *Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 741-42 (D.C.Cir.1983); *DeLaurentiis v. Haig*, 686 F.2d 192, 193 (3d Cir.1982).

The *Vaughn* index does little more than recite the language of section 1202(f). This is not sufficient. The withholding agency's understanding of the scope of section 1202(f) may be incorrect. To enable the FOIA requester to challenge the FBI's conclusion that the documents withheld fell within section 1202(f), the *Vaughn* index must provide a description of the withheld documents, without breaching section 1202(f)'s mandate of confidentiality. Here, for example, without breaching confidentiality, the FBI could have disclosed that the withheld records concerned a foreign citizen's request for a temporary waiver of certain visa requirments, and included the investigating official's recommended disposition of the request.

(2) *Records Relating to Tax Returns*

The FBI relied upon 26 U.S.C. § 6103 in withholding one document.[16] Section 6103 states that "[tax] return information shall be confidential." *Id.* §6103(a). The FBI's *Vaughn* index states only that tax return information was withheld.

Ordinarily, we would find such an explanation of a withholding of tax return information insufficient. Section 6103 contains a long and complex definition of tax return information. *See id.* § 6103(b)(2)(A). Reasonable people could differ as to its interpretation. *Cf. Church of Scientology of California v. Internal Revenue Service*, 792 F.2d 153 (D.C.Cir.1986) (divided en banc court disagreeing over the interpretation of section 6103(b)(2)), *aff'd*, 484 U.S. 9,

[16] Section 6103 specifically exempts documents from FOIA disclosure, *Lessner v. Dep't of Commerce*, 827 F.2d 1333, 1336 (9th Cir. 1987), and is therefore an appropriate predicate for an Exemption 3 withholding.

108 S.Ct. 271, 98 L.Ed.2d 228 (1984). For this reason, the withholding agency must ordinarily provide the FOIA requester with a description of the withheld information sufficient to enable the FOIA requester to challenge the agency's understanding of the scope of section 6103 reflected in the decision to withheld. The confidentiality guaranteed by section 6103 will not be compromised as long as the identity of the person about whom the tax return information relates is not revealed.

Here, however, the released portions of the document suggest the identity of the person whose privacy interests are protected by section 6103. Thus, if the withholding agency were to reveal the precise nature of the tax return information, the confidentiality guaranteed by section 6103 would be compromised. For this reason, the FBI could not disclose more than it did, and therefore was not required to do so.

(3) *CIA Information*

50 U.S.C. § 403(d)(3)(1988) states "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403g (1988) states that "the [Central Intelligence] Agency shall be exempted from the provisions of . . . any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." Both of these statutes specifically exempt information from FOIA disclosure. *National Comm'n on Law Enforcement v. CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978); *see also CIA v. Sims*, 471 U.S. 159, 167, 105 S.Ct. 1881, 1886-87, 85 L.Ed.2d 173 (1985) (discussing section 403(d)(3) only).

The FBI relied upon § 403(d)(3) and § 403g in withholding parts of four documents. The FBI relied upon the affidavit of CIA Agent Dube to justify these withholdings.[17] This affidavit, unlike those submitted by the FBI agents, discusses each document separately. It provides sufficient information with respect to all but one of the withholdings. Two of the withholdings consist only of codenames, identified as such in the Dube affidavit. Codenames plainly fall within section 403g's exemption of the names of CIA agents. No further disclosure would have enabled Weiner to argue for their release. One paragraph of a document labeled CIA-3 was withheld because it identified the location of a CIA installation outside the United States. The Dube affidavit describes how disclosure of this information would compromise "intelligence sources and methods," 50 U.S.C. § 403(d)(3), by leading to public pressure within the host nation to terminate its relationship with the CIA. This was sufficient to enable Wiener and the court to determine whether the government's conclusion that withholding was necessary to protect intelligent sources and methods was subject to challenge.[18]

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[17] This discussion pertains only to information withheld in reliance upon the Dube affidavit. To the extent the FBI relies upon other affidavits to justify the withholding of additional information, we find the affidavit inadequate for the reasons stated in this opinion.

[18] Unlike withholding under Exemption 1, a withholding agency relying upon section 403(d)(3) to protect an intelligence source need not demonstrate disclosure of the source will damage national security. *Sims*, 471 U.S. at 169-70, 105 S.Ct. at 1887-88. Nonetheless, the information provided in the Dube affidavit is sufficiently specific to constitute an adequate *Vaughn* index with respect to Exemption 1 as well. It states in detail the nature of the information (location of a CIA

The Dube affidavit is insufficient, however, with respect to the document labeled CIA-2. The Dube affidavit justifies the deletions of three paragraphs from this document with the statement that "disclosure of [the withheld] portions reasonably could be expected to lead to identification of the source of information." The affidavit fails to discuss the facts or reasoning upon which Agent Dube based his conclusion, and thus affords Wiener no opportunity to contest that conclusion.[19]

C

Exemption 7C: Privacy

Exemption 7C, 5 U.S.C. § 552(b)(7)(C), permits the government to withhold documents and portions of documents "compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy." *Id.* A document is properly withheld under Exemption 7C if the pub-

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station) and the harm to national security likely to result from disclosure (the closing of that station).

[19] We decline to follow the Fifth Circuit's holding in *Knight v. CIA*, 872 F.2d 660, 664 (5th Cir.1989), that, absent a showing of bad faith, the CIA's determination that a document is withholdable under 50 U.S.C. § 403(d)(3) is unreviewable. While the CIA's conclusion that withheld information could lead to the disclosure of a source is entitled to great deference, *Sims*, 471 U.S. at 179, 105 S.Ct. at 1893, the Agency still bears the burden of proving the withholding is justified. 5 U.S.C. § 552(a)(4)(B). *Knight* is inconsistent with this statutory requirement. It also appears to be inconsistent with the Supreme Court's decision in *Sims* in which the Court reviewed the CIA's withholdings under § 403(d)(3) for reasonableness. *Sims*, 471 U.S. at 174, 179-80, 105 S.Ct. at 1893-94.

lic interest in disclosure is outweighed by the individual privacy interests that would suffer from disclosure. *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 1476 & 1483, 103 L.Ed.2d 774 (1989); *Van Bourg, Allen, Weinberg & Roger v. NLRB (Van Bourg II)*, 751 F.2d 982, 985 (9th Cir.1985). A Vaughn index must, to the extent possible without sacrificing the privacy interest in the process, provide the FOIA requester with the information necessary to contest the agency's conclusion that this balance tips in favor of withholding.

Wiener has not appealed Exemption 7C claims where only the name of an FBI agent or third person has been withheld.[20] He challenges only the relatively few withholdings in which entire documents or paragraphs have been withheld to protect the privacy interests of persons whose names appear somewhere in the withheld material. With respect to these withholdings, we conclude the FBI's affidavits are inadequate.

We focus upon the most substantial Exemption 7C withholdings—documents labeled HQ-8 and NY-88. Several pages of HQ-8 were withheld; NY-88 was withheld in its entirety.

Without violating the privacy interests of the informant or the third party, the FBI could have stated that HQ-8 recites information provided by a third party to an FBI informant detailing the third party's knowledge of several activists and protest activities planned at the 1972 Republican National Convention, discussing the possibility that John Lennon would

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[20] We therefore do not comment upon the sufficiency of the *Vaughn* index with respect to the withholding of individual names under Exemption 7C.

organize a series of concerts to raise money to finance the activity,[21] and describing rivalries and jealousies within activist organizations.

Had Wiener been provided with this information, he could have questioned whether the withholding of anything other than the names of the informant, the third party, and the individuals described, implicated privacy concerns. He could also have argued that the names of the activist leaders mentioned in the document should have been released because of the substantial public interest in exploring the scope and extent of the FBI's surveillance activities during a turbulent period of this nation's history. As this brief summary demonstrates, adequate specificity could have been achieved without compromising privacy interests.[22] Instead, the FBI affidavits reveal only that the information in document HQ-8 relates to a third party who is mentioned in FBI files.

Without compromising privacy interests, the FBI could have stated that document NY-88 describes a series of meetings between a third person and various activists, discusses contests over the leadership of activist groups and complaints that activist leaders receive more publicity than the groups themselves, and reports tangential information about activist leaders, such as their habits of personal hygiene and even the peculiar behaviors of their pets. John Len-

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[21] It is difficult to understand why the FBI withheld the information about the series of concerts. The same information was disclosed when the cover memo attached to document HQ-8 was released.

[22] Document HQ-8 was also withheld under Exemption 7D, protecting confidential sources. The discussion in the text also indicates the level of specificity that can be achieved without compromising a source's confidentiality.

non's name appears only in the final paragraph in which it is stated that Lennon was willing to perform at a benefit concert if his appearance were not announced in advance. Without describing generally what the document contained, as we have, it was withheld in its entirety on the ground that the information withheld relates to a third party.[23]

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[23] In contrast to the broad generalities offered to justify most of its Exemption 7C withholdings, the FBI provided model explanations with respect to two sets of documents. Wiener has not appealed these withholdings, and we mention them only to provide further examples of the level of specificity required in a *Vaughn* index.

The supplemental affidavit of Agent Flynn states that four documents were withheld because they document an "investigation . . . based on a citizen's inquires to his Congressman about a nude photograph of Lennon and Yoko Ono on an album cover. The Congressman forwarded the inquiry to the FBI, which responded . . . that no violation [of obscenity laws] existed." This explanation makes clear what the documents contained and that they were withheld because their release might infringe upon the privacy interests of the citizen who made the inquiry. It afforded Wiener an opportunity to argue that this privacy interest was outweighed by other considerations.

The FBI stated that Exhibit OO pertained to the FBI's investigation of someone who threatened the Lennon family. The perpetrator was never identified. The FBI noted that details contained in the document were withheld because, if released, "media publicity would undoubtedly follow. It must be assumed that this unknown subject is alive and would be aware of such publicity. The resulting effect on him is obviously unknown but can be speculated upon. Perhaps this refreshing of his memory would cause him to resume this type of threatening activity against the Lennon family or possibly other well-known personalities. . . . In addition, its release could well be expected to cause John Lennon's widow and her family harassment and unwanted public attention." This statement provided Wiener with sufficient information to

The FBI argues the decision in *Reporters Committee*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), sanctions the categorical approach employed by the FBI in support of Exemption 7C claims. In holding that an individual's privacy interest in his "rap sheet" always outweighs the public interest in disclosure, *id.* 109 S.Ct. at 1485, the Court said "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* at 1483. The FBI argues that the privacy interests of third persons whose names appear in withheld documents always outweigh the public interest in disclosure, and a *Vaughn* index therefore need only recite the fact that the document was withheld to protect the privacy interests of third persons. *Cf. Lewis*, 823 F.2d at 380 (where an entire class of documents is *per se* exempt from disclosure, regardless of content, a *Vaughn* index serves no purpose). We disagree.

The privacy interests of third persons whose names appear in FBI files, the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances.[24] Because it cannot be concluded that the privacy interests characteristically outweigh the public interest with respect to all of the documents withheld under Exemp-

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argue in favor of the release of the withheld document had he chosen to do so.

[24] In contrast, the Court in *Reporters Committee* noted that an individual's privacy interest in the confidentiality of his criminal record is always high, and the public interest in the release of that information is always low. *Reporters Committee*, 109 S. Ct. at 1485.

tion 7C, the FBI's categorical *Vaughn* index is inadequate.

The index also fails to explain with sufficient specificity the "law enforcement purposes," 5 U.S.C. § 552(b)(7), underlying its investigation of John Lennon. No withholding under any of the exemptions listed in section 552(b)(7) is valid unless the withholding agency establishes a " 'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." *Binion*, 695 F.2d at 1194; *accord King*, 830 F.2d at 229; *see also Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 748 (9th Cir.1980) (insufficient evidence to conclude a document was compiled for a law enforcement purpose).[25]

The index states only that John Lennon was under investigation for possible violations of the Civil Obedience Act of 1968, 18 U.S.C. § 231 (1988), and the Anti-Riot Act, 18 U.S.C. § 2101 (1988), because of his association with a radical group known as the Election Year Strategy Information Center (EYSIC).[26]

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[25] Thus, our holding that the *Vaughn* index failed to adequately set forth the law enforcement purpose of the investigation of John Lennon applies equally to withholding under Exemption 7D, protecting confidential sources. Both Exemption 7C and Exemption 7D exempt from disclosure only records "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7).

[26] The FBI's statement, contained in the supplemental affidavit of Agent Flynn, reads in relevant part:

> Th[e] investigation [of John Lennon] was begun following the receipt of confidential source information that Lennon had become associated with EYSIC and its leaders. The founders of EYSIC included Rennie Davis, a "Chicago Seven" defendant, and Stewart Albert. They were soon jointed by Jerry Rubin, another "Chicago

The Civil Obedience Act and the Anti-Riot Act are very broad criminal statutes, prohibiting a wide variety of conduct. Citations to these statutes do little to inform Wiener of the claimed law enforcement purpose underlying the investigation of John Lennon. Without providing Wiener with further details of the kinds of criminal activity of which John Lennon was allegedly suspected, Wiener cannot effectively argue that the claimed law enforcement purpose was in fact a pretext.[27]

D

Exemption 7D: Identity of a Confidential Source

Exemption 7D, 5 U.S.C. § 552(b)(7)(D), permits the government to withhold documents and portions of documents "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records . . . (D) could reasonably be expected to disclose the identity of a confi-

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Seven" defendant. . . . In light of the past activity of the founders of EYSIC, especially with respect to the acts of violence committed during the 1968 Democratic National Convention in Chicago, the FBI initiated this investigation into the relationship between John Lennon and EYSIC. The underlying statutes in this investigation included 18 United States Code §§ 231, 232, 2101, and 2102. . . . This investigation led to the FBI's accumulation of interrelated main files at [FBI Headquarters], New York, Washington Field Office, Houston, and Miami.

[27] Wiener has argued that the law enforcement purpose behind the investigation of Mr. Lennon was in fact pretextual. In Part III we conclude it would be premature to address this contention on the merits until Wiener has had an opportunity to obtain relevant information that may be revealed by an adequate *Vaughn* index.

dential source." *Id.*[28] The index does not provide Wiener with information necessary to challenge the FBI's conclusion that disclosure of documents withheld on this ground would in fact reveal the identity of a confidential source.

The most obvious flaw in the index in this respect is its failure to state whether the purported grant of confidentiality in each case was express or implied. An express grant of confidentiality is virtually unassailable. The FBI need only establish the informant was told his name would be held in confidence. An implied grant is a different matter. An informant's identity is protected by an implied grant of confidentiality only if he provides information under "circumstances from which . . . an assurance [of confidentiality] could be reasonably inferred." H.R.Conf. Rep. No. 1200, 93d Cong., 2d Sess. *reprinted in* 1974 U.S.Code Cong. & Admin. News 6267, 6285, 6291. A claim that confidentiality was impliedly granted, unlike a claim that confidentiality was expressly granted, thus requires the court to engage in a highly contextual, fact-based inquiry. *See, e.g., United Technologies Corp. v. NLRB*, 777 F.2d 90, 93-94 & n. 4 (2d Cir.1985) (upholding a finding that employee-informants were implicitly granted confidentiality by the NLRB based upon "the protracted and bitter"

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[28] There was a substantial overlap between the FBI's withholdings to protect confidential sources under Exemption 1 and Exemption 7D. While both of these exemptions may properly be invoked to protect a confidential source, they are not identical. An Exemption 1 withholding is appropriate only if disclosure of the withheld information can reasonably be expected to damage national security. Exec. Ord. 12356 § 1.1(a)(3), 3 C.F.R. at 167. An Exemption 7D withholding is only appropriate if the information withheld was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7).

nature of the dispute between the plaintiff and its employees' union). Without knowing whether the grant of confidentiality claimed was express or implied, the requester cannot challenge the claim intelligently.

Moreover, if the FBI is relying upon implied grants of confidentiality to justify its withholdings, the explanation given is inadequate. To serve its purpose, the index must state the circumstances surrounding the receipt of information which led the FBI to conclude the informant would not have given the information without an implicit assurance of confidentiality. Only if the requester has these facts can he intelligently argue no inference of confidentiality was justified; and only if the district court is apprised of these facts can its judgment on the merits be an informed one.[29]

Instead, the FBI said only this:

> These sources [who are impliedly granted confidentiality] are equally as important to the FBI

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[29] Three circuits adhere to the rule that information given a law enforcement agency in the course of a criminal investigation is presumed to have been given in confidence, absent evidence to the contrary. *See Schmerler v. FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990); *Kimberlin v. Dep't of Treasury*, 774 F.2d 204, 208 (7th Cir. 1985); *Johnson v. Dep't of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984); *but see Dow Jones & Co., Inc. v. Dep't of Justice*, 917 F.2d 571, 579-80 (D.C. Cir. 1990) (Edwards, J., dissenting from denial of rehearing en banc; urging the full court to reverse *Schmerler*). Requiring the agency to disclose the facts and circumstances surrounding the receipt of information is not inconsistent with this rule. An adequate *Vaughn* index insures the district court a record upon which to base its decision, regardless of what presumption may be appropriate or what conclusion may be justified when a properly developed record proves to be inconclusive.

> as those sources to whom an express assurance of confidentiality has been made. The disclosure of the names and/or the identifying data concerning these individuals would nullify this implied assurance of confidentiality between the individuals and the FBI.

This general assertion that sources furnishing information under express or implied grants of confidentiality are equally important, and that disclosure of the identity of the informant would be equally inconsistent with the assurances of confidentiality in either case, is of no assistance in determining whether an inference of confidentiality as to disclosure of particular information was reasonable under the circumstances.

Because the *Vaughn* index did not disclose the facts and circumstances surrounding the receipt of information from informants, the district court and opposing counsel were forced to look through a voluminous set of documents in an effort to find some evidence of the circumstances surrounding each purported grant of confidentiality. Moreover, the search necessarily accomplished little because the withheld documents, particularly in redacted form, did not provide much information of this kind.

An adequate *Vaughn* index would have guided the district court and opposing counsel to questionable claims of exemption. For example, without compromising confidentiality, the FBI could have informed Wiener and the district court that during a hearing before the Immigration and Naturalization Service regarding the deportability of John Lennon, Mr. Lennon's attorney represented that Mr. Lennon had been offered a teaching post at New York University; that the FBI later investigated the truth of this claim;

and that as part of its investigation, the FBI contacted an official at New York University who stated the University had in fact offered John Lennon a teaching position. The name of this University official, and all facts which could lead to his identity, are still being withheld by the FBI under Exemption 7D. Indeed, until 1984 this information was classified as "secret" by the FBI.[30]

II

District Court Findings

"Disclosure of the factual and legal basis for the trial court's decision is especially compelling in FOIA cases." *Van Bourg, Allen, Weinberg & Roger v. NLRB (Van Bourg I)*, 656 F.2d 1356, 1357 (9th Cir. 1981). The district court's findings of facts and conclusions of law must be " 'sufficiently detailed to establish that the careful *de novo* review prescribed by Congress has in fact taken place.' " *Id.* at 1358 (quoting *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 950 (D.C.Cir.

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[30] We reject Wiener's contention that the FBI failed to adequately justify the breadth of its withholdings under Exemption 7D. Wiener contends an agency may withhold only the names of confidential sources and information which may lead to the exposure of a confidential source. However, the plain language of Exemption 7D authorizes the withholding of information "*furnished by* a confidential source" in the course of criminal investigation, whether or not disclosure of the information would lead to the exposure of the source. 5 U.S.C. § 552(b)(7)(D) (emphasis added). The *Vaughn* index in this case clearly states that the information withheld was furnished by confidential sources. Thus, if the FBI establishes the sources were truly confidential, and if the district court accepts the veracity of the government's affidavits, the witholdings were proper.

1979)). *Accord Truitt v. Dep't of State*, 897 F.2d 540, 547 (D.C.Cir.1990). "The reviewing court should not be required to speculate on the precise relationship between each exemption claim and the contents of the specific document[s]." *Van Bourg I*, 656 F.2d at 1358 (quoting *Ray v. Turner*, 587 F.2d 1187, 1197 (D.C.Cir.1978)).

The district court's findings consist of a list of the affidavits submitted by government and the conclusory statement that "[t]he above-listed affidavits and declarations carry the government's burden of proof to show that the FOIA exemptions were properly applied in this case." Like the *Van Bourg I* court, "[w]e are unable to determine which exemption the court applied to each document withheld and what relevant undisputed facts provided the basis for non-disclosure." *Id.* at 1357. After receiving an adequate *Vaughn* index and conducting any additional proceedings the district court deems necessary on remand, the court must "state in reasonable detail the reasons for its decision as to each document in dispute." *Id.* at 1358.

The district court also erred by failing to make specific findings on the issue of segregability. 5 U.S.C. § 552(b) provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." Here, many documents were withheld either in their entirety or in substantial part. It is reversible error for the district court "to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof," with respect to that document. *Church of Scientology*, 611 F.2d at 744. The court on remand must make a specific finding that no information contained in each

document or substantial portion of a document withheld is segregable.

III

Triable Issues of Fact

Wiener argues summary judgment was inappropriate because triable issues of fact remain. In particular, he contends the FBI has failed to establish by uncontested facts that the documents withheld under Exemptions 7C and 7D were "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), and that the documents withheld under Exemption were not withheld merely "to conceal violations of law, inefficiency, or administrative error[, or] to prevent embarrassment to a person, organization, or agency." Exec. Ord. 12356 § 1.6(a), 3 C.F.R. at 170. He points to a memorandum signed by FBI Director J. Edgar Hoover expressing concern that John Lennon might not be deported prior to the 1972 Republican National Convention;[31] a memorandum from Acting FBI Director Gray stating the INS's belief that it had a weak case for deportation and that an arrest on narcotics charges would insure immediate deportation;[32] and a memorandum to Senator Strom Thurmond, later forwarded to Attorney General John Mitchell, stating that termination of Lennon's visa would be a "strategic countermeasure" against the political strategies of anti-war and anti-Nixon groups.[33]

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[31] This memorandum is the cover memo to the document labeled HQ-8.

[32] This document was labeled HQ-24.

[33] The release or withholding of this document is not a subject of this litigation, but it was made part of the record below.

It would be premature to address Wiener's claim. Without an adequate *Vaughn* index and sufficient findings of fact to guide us we cannot say whether these documents, in light of the rest of the record, raise a triable issue of fact.

This panel shall retain jurisdiction over all subsequent appeals.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-1720-RMT (Bx)

JONATHAN M. WIENER, PLAINTIFF

vs.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Feb. 29, 1988]

This matter having come before the court on the motion by defendant for summary judgment and the cross-motion by plaintiff for summary judgment, and this court having considered the pleadings and other documents filed herein, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This action was originally filed on March 22, 1983 and an Answer to the Complaint was filed on May 23, 1983. Plaintiff seeks relief under the Freedom of Information Act ("FOIA"). The subject matter of plaintiff's FOIA request concerns documents relating to the late John Lennon. On or about January 10, 1984, plaintiff filed a Motion to Compel Preparation of Adequate Vaughn Index. On January 30, 1984, defendant filed an opposition thereto. On February 27, 1984, defendants filed the Declara-

tion of Robert F. Peterson Addressing the Application of Exemption One of the Freedom of Information Act, and on March 1, 1984 defendants filed the Declaration of Robert J. Chester.

2. On March 14, 1984, the court ordered the government to file, *in camera* and under seal, one or more Declarations which specifically explain the reasons the claimed FOIA exemptions apply in each instance in which an exemption is claimed. Pursuant to the court's Order, the government filed the *In Camera* Declarations of Mr. Peterson and Mr. Chester, with exhibits. Also, the government filed on May 8, 1984, the Affidavit of Louis J. Dube (concerning certain CIA deletions), on August 2, 1984 another public Declaration of Mr. Chester (concerning certain declassified documents), and on November 6, 1984, the Declaration of Sharon Koors (concerning the FBI's FOIA document search in the Miami Field Office).

3. On March 6, 1987, the government filed its motion for summary judgment.

4. In support of its motion for summary judgment, the government has filed the following affidavits and declarations:

a. (First) Declaration of FBI Special Agent Robert F. Peterson addressing The Application of Exemption One of the Freedom of Information Act, filed herein on February 27, 1984. This Declaration sets forth the reasons for withholding classified information (sometimes referred to as Exemption 1 or b1 material) in this case.

b. (First) Declaration of FBI Special Agent Robert J. Chester filed herein on March 1, 1984 (with Exhibits A-VV). This Declaration sets forth the processing of plaintiff's FOIA request with attached documentary reference to the processing (Ex-

hibits A-NN), describes the FBI file system and record search pursuant to plaintiff's requests; and describes the reasons for the withholding of the unclassified information under the FOIA together with an explanation of the coded format used on the documents themselves.

c. (Second) *In Camera* Declaration of FBI Special Agent Robert F. Peterson, filed *in camera* and under seal pursuant to the court's Order of March 14, 1984.

d. (Second) *In Camera* Declaration of FBI Special Agent Robert J. Chester, filed *in camera* and under seal, pursuant to the court's Order of March 14, 1984.

e. Affidavit of CIA Information Review Officer Louis J. Dube, filed herein on May 8, 1984. This Affidavit sets forth the FOIA exemptions asserted by the CIA as to certain documents.

f. (Third) Declaration of FBI Special Agent Robert J. Chester, filed herein on August 2, 1984. This Declaration sets forth applicable FOIA exemptions as to certain documents which were declassified during the pendency of this case.

q. Declarations of Sharon Koors, Office Service Manager of the Miami Field Office of the FBI, filed herein on November 6, 1984. This Declaration sets forth information concerning the FBI's FOIA document search in Miami.

h. Declaration of FBI Supervisory Special Agent Chris J. Flynn, Records Management Division, filed herein on October 16, 1987. This Declaration supplements and clarifies the record containing the FBI exemptions, particularly as to the factors underlying the FBI's initial investigative interest in John Lennon, and the nature of the confidential sources involved.

i. Declaration of CIA Information Review Officer Lee E. Carle, filed herein on October 16, 1987. This Declaration supplements the prior affidavit of Mr. Dube concerning the CIA exemptions, and releases two prior withholdings concerning a cryptonym.

5. The above-listed affidavits and declarations carry the government's burden of proof to show that the FOIA exemptions were properly applied in this case.

Any finding of fact which may be deemed a conclusion of law is incorporated into the Conclusions of Law section below, and any conclusion of law which may be deemed a finding of fact is incorporated into the Findings of Fact section above.

CONCLUSIONS OF LAW

1. The government's application of exemptions 1, 2, 3, 7(C) and 7(D) is within the applicable case-law and has been properly applied under those exemptive provisions of the Freedom of Information Act, as amended by the Freedom of Information Reform Act of 1986.

2. There is no genuine issue of material fact, and the defendants are entitled to judgment as a matter of law. Judgment shall be entered herein accordingly.

Dated: 29 Feb. 1988

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-1720-RMT(Bx)

JONATHAN M. WIENER, PLAINTIFF

vs.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,
DEFENDANTS

MEMORANDUM

[Filed Feb. 23, 1987]

The court has reviewed the declarations submitted by defendant and has carefully compared those that have been filed and served on plaintiff's counsel with those that have been submitted for the court's *in camera* inspection.

As to those documents which were claimed exempt by defendant pursuant to (b)(1), which were subsequently declassified by the government, the court finds that defendant is not estopped from, and has not waived its right of, claiming any other exemption it determines to be applicable.

As defendant has indicated its intention of filing a motion for summary judgment, the Court hereby invites such filing.

Although plaintiff has requested disclosure of the *in camera* declarations, because such disclosure is the ultimate remedy defendant seeks to prevent by its defense herein, this court shall defer ruling on such

request and shall rule on it at the time of ruling on defendant's proposed summary judgment motion.

Dated: 23 Feb. 1987.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-1720-RMT (Bx)

JONATHAN M. WIENER, PLAINTIFF

vs.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,
DEFENDANTS

ORDER REQUIRING IN CAMERA FILING OF SPECIFIC DECLARATION

[Filed Mar. 14, 1984]

This matter having come before the court for hearing on March 12, 1984 on the motion by plaintiff to compel preparation of adequate *Vaughn* index, and this court having considered the pleadings and other documents filed herein and argument of counsel,

IT IS ORDERED that defendant, not later than May 20, 1984, file in camera and under seal, a declaration or declarations which specifically explain the reasons the claimed exemptions apply in each instance in which an exemption is claimed.

Dated: Mar. 14, 1984.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5867

D.C. No. CV-83-1720-RMT

JONATHAN M. WIENER, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION; FEDERAL BUREAU OF INVESTIGATION, LOS ANGELES FIELD OFFICE; FEDERAL BUREAU OF INVESTIGATION, NEW YORK FIELD OFFICE; FEDERAL BUREAU OF INVESTIGATION, DETROIT FIELD OFFICE, DEFENDANTS-APPELLEES

Filed December 16, 1991

Before: James R. Browning, Mary M. Schroeder and Warren J. Ferguson, Circuit Judges

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ORDER

The government's argument that our holding in this case conflicts with *Silet v. United States Department of Justice*, No. 90-1069 (7th Cir. Oct. 10, 1991) (en banc) misreads our opinion. *Silets* held that a district court did not abuse its discretion in denying *in camera* review of records requested under the Freedom of Information Act ("FOIA"), 5 U.S.C.

§ 552, because affidavits submitted by the government "(1) describe[d] the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate[d] that the information withheld [fell] logically within the claimed exemption[s] and (3) [were] not controverted by either contrary evidence in the record or by evidence of bad faith." *Id.*, slip op. at 3 (citations omitted). Our opinion is not to the contrary. We held the affidavits submitted by the government in this case did not adequately describe the withheld documents and justifications for non-disclosure, and remanded to permit the government to submit affidavits containing sufficient detail to allow Wiener "to intelligently advocate release of the withheld documents" and the district court "to intelligently judge the contest," *Wiener v. F.B.I.*, No. 88-5867 (9th Cir. July 12, 1991, as amended September 26, 1991), slip op. at 13488. We expressed no views as to when, or whether, submission of such affidavits would make *in camera* review of the withheld documents unnecessary. *See id.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records available to any person.

* * * * *

(4) * * *.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * * [.]

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45389

Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

No. 91-1641

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FEDERAL BUREAU OF INVESTIGATION, et al.,
Petitioners,
vs.
JONATHAN M. WIENER,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant review in a case where the court of appeals simply held that the FBI's vague, boilerplate justifications for refusing to disclose materials subject to a FOIA request failed to supply information sufficient to enable the court to reach a decision on the merits of the exemption claims, and remanded to require the government to provide more adequate explanations?

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Respondent Jonathan M. Wiener respectfully asks the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

Jonathan M. Wiener, a Professor of History at the University of California, Irvine, brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 (1988), against four offices of the Federal Bureau of Investigation, seeking disclosure of FBI records concerning John Lennon, a former member of the Beatles.

As revealed by the documents the Bureau did disclose (in whole or in part), the FBI closely monitored Lennon's activities in the early 1970s at the direction of the White House and high FBI officials, as part of what Wiener argued was a pattern of abuse of executive agency power to suppress political dissent. Although Lennon was never arrested, indicted or prosecuted for any act during the period of FBI surveillance, or at any time thereafter, the FBI classified his file for years. The documents disclosed after Wiener's request, or after the filing of this action, reveal no apparent legitimate explanation for their prior secrecy.[1]

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[1]For example, the FBI had classified as "confidential" for ten years all of document DE-4, relying upon the FOIA exemption from disclosure of "information which is currently and properly classified . . . in the interest of national defense or foreign policy." In January 1983, after submission of Wiener's request, certain sections of the document were declassified and released, among them, the complete lyrics from one of Lennon's songs, as precisely transcribed by an

(continued...)

Instead, they expose a politically-motivated attempt to neutralize Lennon's perceived effectiveness in organizing anti-war opposition against the president during the 1972 campaign in particular.[2] As the documents suggest, and as Professor Wiener wished to demonstrate, Lennon appears also to have been a victim of a vast spying operation organized by the Central Intelligence Agency (CIA) between 1967 and 1974,

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[1](...continued)
agent and as performed at a December 1971 anti-war rock concert in Ann Arbor, Michigan. Also included among the declassified documents was DE-3, a newspaper review of a Lennon rock concert, reporting in part that the performance of a new song was "lacking Lennon's usual standards and that Yoko Ono, who also appeared, 'can't even remain on key.'"

[2]For instance, document HQ-38 relates a report from the San Francisco FBI office to then Acting Director L. Patrick Gray that, as of August 1, 1972, Lennon would make public his support for Senator George McGovern in the presidential election. FBI director J. Edgar Hoover stated in a memorandum dated April 10, 1972, that "[s]ubject [Lennon] continues to plan activities directed toward RNC [Republican National Convention] and will soon initiate a series of 'rock concerts' to develop financial support." HQ-8. Documents including HQ-11, HQ-12, HQ-15 and HQ-37 discuss the reported appointment of Lennon to a teaching position at New York University during the summer of 1972. Though the information was false, the memoranda were classified "confidential" and "urgent." Similarly, Acting FBI Director Gray stated in a 1972 FBI memorandum (HQ-20) to the special FBI agent-in-charge in New York, also partially withheld pursuant to the (b)(1) national defense exemption, that "FBI agents testifying [regarding surveillance of Lennon], would not be in the Bureau's best interest and could result in considerable adverse publicity."

results of which were conveyed to high-level FBI officials. Thus, a document relating information concerning John Lennon transmitted to the FBI by the CIA contains the heading "MHCHAOS." This heading refers to Operation CHAOS which, according to the 1976 Report of the Senate Intelligence Committee (the Church Committee), involved CIA intelligence gathering on lawful domestic political activity by means of electronic eavesdropping, mail openings, undercover agents and FBI reports. The Senate staff report characterized Operation CHAOS as "a step toward the dangers of a domestic secret police." *See Final Report*, Book 2, 94th Cong., 2nd Sess., 1976, pp. 99-102.

While the FBI made some limited disclosures, 69 entire pages and portions of dozens of others were withheld based on the broad claim that disclosure of the records of a twenty-year old surveillance of a rock singer, dead now for over a decade, would somehow jeopardize our national security, invade privacy, or disclose confidential sources. In response to plaintiff's request for a *Vaughn* index,[3] the FBI filed generalized affidavits reciting vague boilerplate assertions which it apparently had copied verbatim from other, unrelated cases.

The affidavits failed to focus on *any* specific instance where an exemption has been invoked. Instead, the government used what it called a "coded" approach to *Vaughn* indices, in which one or more notations were recorded for each claimed exemption. Each notation referenced several possible explanations within the

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[3]"Vaughn index" is a phrase derived from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). It is a system of itemizing and indexing correlating the government's justifications for refusing to disclose a document with the actual portions of the documents at issue.

submitted declarations for each of the various codes applied. The explanations, rather than being directed at the facts of this case, were broadly framed, exhaustive recitations of seemingly *all* imaginable adverse consequences that *might* result from unwanted disclosures. *See, e.g.*, Pet. App. at 5a-7a. Identical codes were invoked repeatedly -- some as often as fifty times.

In January 1984, Wiener objected that these affidavits did not describe the documents at issue, let alone explain why the material was being withheld, and thus were of no value in justifying the claimed exemptions. After the district court ordered the FBI to submit *in camera* more specific justifications, the FBI filed two *in camera* affidavits along with a copy of the withheld information. In August 1984, Wiener asked the court to order that those affidavits be disclosed, or that he be provided with more detailed affidavits than the ones he had received.

The district court never ruled on Wiener's motion for a more adequate *Vaughn* index. Instead, more than two years later, it invited the FBI to file a motion for summary judgment, which it granted in February 1988. In its ruling, the court adopted verbatim the proposed findings of fact and conclusions of law submitted by the FBI. Beyond listing the affidavits submitted by the government, the court merely stated that "[t]he above-listed affidavits and declarations carry the government's burden of proof to show that FOIA exemptions were properly applied in this case."

The court of appeals remanded on two grounds.[4] First, relying on *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), it held that the affidavits provided by the FBI failed adequately to explain the withholdings. As a result, Wiener could not "intelligently advocate release of the . . . documents," and the district court could not "intelligently judge the contest" (Pet. App. at 8a). The appellate court directed the government to submit more satisfactory affidavits, prior to which it could not rule on the merits of the FOIA suit.

Second, the court held that the trial judge had failed to state the reasons for his decision or to make specific findings as to whether any portion of a withheld document could have been segregated for disclosure. In the absence of such findings, the court of appeals held that it was unable to conduct a meaningful review.

Petitioners sought rehearing by the panel and suggested the need for rehearing *en banc*. The panel denied the petition, noting that the suggestion for *en banc* review had been rejected with no judge requesting a vote on the suggestion.

REASONS FOR DENYING THE WRIT

The FBI petitions for certiorari to review an unexceptional opinion that simply applied settled procedural principles of FOIA litigation to the particular facts of this case. The court of appeals did not require petitioners to disclose any document, nor did it address

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[4]The court of appeals found that it would be premature to address Wiener's contention that there were triable issues of fact regarding the FBI's claims of exemption (Pet. App. at 30a-31a).

the substantive requirements for invoking various FOIA exemptions. In fact, the court pointedly declined to rule on Wiener's claim that triable issues of fact remained and, therefore, that the district court had improvidently granted summary judgment. Rather, the court held that it was in no position to reach the merits of the dispute because the government had failed to provide the information necessary to enable respondent to argue, and the judiciary to decide, whether the materials at issue were properly withheld. The district court's *in camera* review could not remedy this situation, of course, for it left Wiener unable to support his claim and the courts incapable of conducting meaningful review. Petitioners' assertion that the court of appeals formulated new FOIA standards is thus erroneous or, at best, greatly premature. Indeed, far from expressing a judgment on the merits that the government had to divulge more than it already had, the court held that to rule on the basis of petitioners' submissions alone would subvert both the adversarial process and the proper operation of judicial review. The court of appeals' conclusion is unremarkable, limited in scope, and fully consistent both with the statutory goal and two decades of case law that has attempted to fulfill it. Accordingly, the decision does not warrant plenary review by this Court.

I. The Decision Below Followed Settled Principles

1. Review should be denied because the Ninth Circuit did nothing more in this case than reiterate a well-established principle: That the government must provide both the judiciary and the requesting party in a FOIA suit with an explanation sufficient to "permit the court system effectively and efficiently to evaluate the

factual nature of disputed information.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn v. Rosen*, 484 F.2d at 826). The court of appeals did not require, and respondent did not ask for or expect, details that would be immaterial to this determination or that would reveal information properly exempt from disclosure. What petitioners ominously call "brinkmanship" (Pet. Br. at 2) is simply the commonplace obligation to provide information reasonably necessary to make a decision on whether to require disclose.

Petitioners' first question presented thus mischaracterizes the nature of the appellate court's holding. Of course, an agency need not provide additional information "if such detail is not needed to prove that the withheld material is exempt from disclosure under the [FOIA]." In this case, however, the court of appeals found precisely that such information *was* necessary in order for it, and the district court, to reach a just and informed decision. Surely, that finding, which is tied entirely to the facts of this case, provides no reason for review by this Court.

Morover, the conclusion is plainly correct. The aim of FOIA is to "create a judicially enforceable public right to secure [official] information from possibly unwilling official hands." *EPA v. Mink*, 410 US 73, 80 (1973).[5] For this right to be meaningful, especially

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[5]Section 552(a)(4)(B) provides:

> On complaint, the district court has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case, the court shall

(continued...)

given the obvious imbalance between the two parties, Congress placed on the government agency the burden to establish that a given document is exempt from disclosure. 5 U.S.C. 552(a)(4)(B); *see also Mink, supra*. Courts traditionally have interpreted this to mean that the government must provide information sufficient to permit the requester to advocate effectively for release and to provide the court with an informed basis for its decision. Submission of a *Vaughn* index is one way, specifically approved by Congress, of achieving this goal. *See* S.Rep. No. 93-854, 93d Cong., 2d Sess. 14-15 (1974).[6]

It is an understatement to say that petitioners did not approach this case in that spirit. The affidavits that were given to the district court and to respondent were couched in terms so broad and conclusory that they were essentially useless, merely parroting the statutory grounds for withholding, without even remotely tying them to the

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[5](...continued)

> determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section and the burden is on the agency to sustain its action.

[6]Beginning with the *Vaughn* decision itself, courts routinely have remanded for more detailed affidavits when the agency has not suitably supported its position. *See, e.g., Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1015 (D.C.Cir. 1976); *Ferri v. Bell*, 645 F.2d 1213 (3rd Cir. 1981).

facts of this case.[7] Indeed, identical affidavits, "drawn from a 'master' response filed by the FBI for many FOIA requests" (Pet. App. at 6a), were also used in two wholly unrelated cases, *King v. United States Department of Justice*, 830 F.2d at 223 (Pet. App. at 6a n.7), and *Powell v. United States Department of Justice*, 584 F. Supp. 1508 (N.D. Cal. 1984).[8] In both instances, the courts found, as here, the formula affidavits "entirely inadequate." *See e.g.*, *Powell*, 584 F.Supp. at 1513.

The decision here does not, contrary to petitioners' suggestion (Pet. Br. at 12-14), require submission of a *Vaughn* index in *all* cases or establish a pre-defined standard of specificity with which all indices

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[7]As the Ninth Circuit noted, John Lennon's name does not even appear in the original *Vaughn* index submitted by the FBI (Pet. App. at 6a).

[8]For example, the *King* opinion quotes part of the FBI's declaration offered in that case The declaration asserts that the requested information

> "may contain details obtained from a one-on-one conversation between a source and another individual. It may be of such detail that it pinpoints a critical time frame. . . . In sum it is the degree of specificity of this information that endangers the source's continued anonymity. It is my determination that disclosure of this information would enable a hostile analyst to unravel the cloak of secrecy that protects the intelligence source's identity."

830 F.2d at 223 n.96. The same exact language is mimicked in the affidavits submitted in this case, with the exception of the words "in sum" and "it is my determination that."

must comply. Nor does it in any way compel the government to reveal in an affidavit the very information for which a FOIA exemption is claimed. Rather, the appellate court made clear that it was concerned with whether the affidavits accomplished their dual purpose -- to "restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision" (Pet. App. at 4a) -- by approvingly citing to cases finding the government's affidavits adequate, even though they fell short of a *Vaughn* index, when they "described in sufficient detail the undisclosed material." *See* Pet. App. at 4a n.5 (citing *Lewis v. I.R.S.*, 823 F.2d 375, 378-79 (9th Cir. 1987); *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 74 (2nd Cir. 1981)).[9]

Based on the facts of this case, the court concluded that the particular *Vaughn* index submitted by the government was little more than a catalog of alternative grounds for exemptions that could just as easily have applied, verbatim, to the disclosure of documents concerning the spying of diplomatic personnel, nuclear proliferation, or ultra-sensitive military plans. The government offered the court, in the guise of a justification, an exhaustive inventory of all theoretically plausible statutory reasons for exempting a document from disclosure. In other words, this *Vaughn* index was no index at all, but rather an automatic, pre-

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[9]Accordingly, there is no conflict between the decision below and the cases cited by petitioners (Pet. Br. at 13-14) for the proposition that *Vaughn* indices are not systematically required. All agree that the purpose of the index -- to "justify withholding requested information," *Vaughn v. United States*, 936 F.2d 862, 867 (6th Cir. 1991) -- must be met. The court of appeals found that in this case, it was not.

packaged reply, mechanically delivered in response to Professor Wiener's FOIA claims.[10]

For example, the justification for withholding the numerous documents relating to John Lennon to which the government affixed a "(b)(1)d1" code read as follows:

> The unauthorized disclosure of [this] information . . . can reasonably be expected to *inter alia*:
>
> Lead to foreign diplomatic, economic and military retaliation against the United States;
> Identify the target, scope, and time frame of intelligence gathering activities of the United States in or about a foreign country, resulting in the curtailment of these activities;
> Enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities;
> Compromise cooperative foreign sources, jeopardize their safety and curtail the flow of information from these sources;

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[10]How else, for example, is one to explain the government's assertion that release of some information regarding the twenty-year old surveillance of a now-deceased rock star might "[l]ead to . . . military retaliation against the United States"? As the court of appeals remarked, "[n]o explanation is given why seemingly farfetched harms . . . have any relevance to the particular documents withheld" (Pet. App. at 14a).

> Endanger citizens of the United States who might be residing or traveling in the foreign country; resulting in damage to the national security.

Numerous other illustrations furnished by the Ninth Circuit speak for themselves and cast serious doubt on the government's boilerplate, kitchen-sink-inclusive approach to exemption justifications. *See* Pet. App. at 5a-8a.[11]

The court of appeals remained well within its traditional role, merely holding that the government's affidavits were inadequate for they allowed neither Wiener to challenge, nor the courts to judge (or even comprehend), the decision to withhold. It reasonably determined that sweeping and unsubstantiated assertions that disclosure of materials concerning former Beatle John Lennon's surveillance might cause "civil disorder or unrest in a foreign country," threats to our national security, and other, equally fantastic effects were too conclusory to justify withholding. This determination certainly is not cause to invoke the Court's power to grant review.

2. The only question, then, is whether under these precise circumstances resort to *in camera* review of the documents themselves, without the benefit of an adequate road map, constitutes a satisfactory procedural

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[11]The Court of Appeals examined the adequacy of the *Vaughn* index in detail for each of the government's claimed exemptions, pointing out where and why it was at a loss to understand the link between the FBI's generalized assertions of potential injury and the content of the documents themselves.

protection.[12] Petitioners, noting that the court of appeals did not "hint[] that the district court erred on the merits," *id.*, claim that requiring additional indices constitutes "procedure for the sake of procedure." *Id.* The contention is without merit.

Indeed, cases from all circuits emphasize that *in camera* review, without more, exacerbates the very problems inherent in FOIA litigation. Certainly, it does not vindicate respondent's interest in being able intelligently to present his case before a court. *See* Pet. App. at 4a n.5. But it also fails just as assuredly to assist the court in reaching a decision whenever it is not self-evident, on the face of the document, *why* a claimed exemption should apply. So, the court found, it was here.

In fact, petitioners' suggestion would mean that, in reviewing a district court's decision, appellate courts themselves might be compelled to conduct their own *in camera* inspection, without the benefit of the government's -- let alone opposing counsel's -- guidance. This obligation to wade through a mass of documents represents a formidable burden on the court system, in effect a shift of the government's statutory burden to the judiciary. The court of appeals, in expressing this concern, simply echoed the views of sister courts. *See, e.g., Seafarers International Union of AFL-CIO v. Baldovin*, 508 F.2d 125 (5th Cir. 1979).

Ultimately, that the court of appeals required more detailed affidavits without ruling on the merits strengthens the case against this Court granting review: It indicates, once again, that the court's opinion was

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[12]It is unclear from the record whether the district court relied on the *in camera* affidavits or not, and whether it examined the actual, unabridged documents that are at issue.

limited to the holding that it lacked sufficient information to reach a decision. Contrary to petitioners' assertion, it does not reflect pointless obsession with procedure. A court demanding a more adequate record before issuing its ruling is doing nothing more. In both instances, the court refrains from ruling on the merits because it is unable to, not because it wants the parties to overcome a superfluous procedural hurdle.[13]

Thus, petitioners are plainly wrong when they claim that "the Ninth Circuit did not express any doubt that the district had an adequate factual basis for its ruling" (Pet. Br. at 2, 21). At the very heart of the appellate court's decision is the fact that the agency failed to provide enough information "to afford the court an opportunity to intelligently judge the contest" (Pet. App. at 8a). *See also id.*, at 8a n.9.

3. Contrary to petitioners' contention (Pet. Br. at 12), there is no conflict between the decision in this case and the views of other circuit courts. Petitioners have cited to no case holding that *in camera*

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[13]Indeed, there should be nothing surprising in a court's request for additional justification even *after* it has reviewed the documents themselves. Certainly, the government cannot be suggesting that a court, sitting without the benefit of *any* governmental input, could somehow sift through stacks of documents and determine which should, and which should not, be submitted to the public's scrutiny. *See Ingle v. Department of Justice*, 698 F.2d 259, 269-70 (6th Cir. 1983) (district court improperly decided that certain documents viewed *in camera* should be disclosed, without giving the government an opportunity to present any applicable exemptions). The Ninth Circuit's opinion expresses a similar sentiment: That neither it nor the district court could reach an informed decision absent appropriate explanations from the FBI.

review, as a matter of law, uniformly suffices for a court to reach a reasoned decision. In particular, the government errs in intimating disharmony with the D.C. Circuit (Pet. Br. at 14 n.10): Twice, that circuit has suggested that detailed public affidavits should be submitted *even* where *in camera* inspection has taken place, in order to appropriately focus and define the issues. *See Lykins v. Department of Justice*, 725 F.2d 1455, 1463 (1984); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (1976).[14] Courts -- including in virtually all the cases cited by petitioners (Pet. Br. at 14 n.10) -- recurrently have underscored the shortcomings of *in camera* inspection. Indeed, these cases undermine rather than bolster the case for review by this Court, insofar as they emphasize that affidavits should be used unless they would reveal the very information which is claimed to be exempt.[15] Here, neither the district court, nor the court of appeals, nor, even, the governmental agency,

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[14]Inexplicably, petitioners cite as providing support for their view a case that refers to both those opinions for that very proposition. *See King, supra*, 830 F.2d at 218 n.68, 225 n.119.

[15]*See Ingle, supra*, 698 F.2d at 266 ("The statute's legislative history and the Supreme Court's language in *Robbins Tire & Rubber Co.* [*see infra*], emphasize that no court should consider *in camera* review if a *Vaughn* index can adequately resolve the issue"); *King, supra*, 830 F.2d at 225; *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) ("The *in camera* review provision [of FOIA] is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved").

maintained that a more helpful affidavit could not be produced.

Ultimately, the question whether a district court's exclusive reliance on *in camera* inspection despite inadequate agency justifications is permissible must turn on the particular facts of a case and therefore does not warrant review. An appellate court might uphold the trial judge's decision to proceed in such a manner.[16] But, contrary to petitioners' erroneous suggestion that no court ever has required the submission of additional *Vaughn* indices under such circumstances, it also might not. Directly on point is *Church of Scientology of California v. I.R.S.*, 792 F.2d 146 (D.D.C. 1986). In that case, plaintiffs had moved for an order requiring the government agency to prepare a *Vaughn* index of withheld documents. Denying this motion, the district court instead ordered *in camera* submission of some of the undisclosed materials, and, as in the present case, granted the agency's motion for summary judgment. The

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[16]In only two cases cited by petitioners did the appellate court so hold. One, *Ingle*, *supra*, began by underscoring the "disabilities inherent in *in camera* review," 698 F.2d at 264, and the fact that it was "'contrary to the traditional judicial role of deciding issues in an adversarial context upon evidence openly produced in court.'" *Id.*, at 265 (quoting *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1311 (8th Cir. 1978)). Nonetheless, it concluded that, given the "relatively modest number of pages" to be inspected, *in camera* review provided the trial judge with an adequate basis for its decision. *Id.*, at 267-68. In the other, *Donovan v. F.B.I.*, 806 F.2d 55 (2nd Cir. 1986), the court noted that the trial judge had inspected the materials on two separate occasions, and therefore "[i]n this case, the District Court was thoroughly familiar with the litigation and the documents." *Id.*, at 59.

court of appeals vacated this order, faulting the trial court for ruling "without the benefit of detailed public affidavits or indices." *Id.*, at 153. As then Judge Scalia explained, such an approach might

> place [] unrealistic and unsustainable demands upon the trial court and the reviewing appellate panel, and therefore must be replaced or supplemented by the adversary testing which public affidavits and indices seek to provide.

Id.

Likewise, in *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C.Cir. 1986), the D.C. Circuit, like the court in this case, held that it could not affirm a decision to exempt certain documents from disclosure even though the district court had inspected them *in camera*. Because it lacked "a detailed record essential to this type of action," *id.*, at 1088, the appellate court remanded so that the government could justify its claimed exemptions with the necessary particularity. *Id.*, at 1092. In *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3rd Cir. 1981), a case cited by the FBI, the court held that even documents submitted to the trial judge must be accompanied by detailed justifications for non-disclosure. *Id.*, at 922, 927-28. *See also Landano v. U.S. Dep't of Justice*, 956 F.2d 422, 436 (3rd Cir. 1992) ("While it is clearly appropriate for an agency to . . . tender its files, it cannot through such a tactic require the court to do its homework for it.").

Finally, petitioners' assertion that the holding in this case is incompatible with the recent decision in *Silets v. United States Dep't of Justice*, 945 F.2d 227 (7th Cir. 1991) (en banc), is groundless. The question in *Silets*

was whether the district court abused its discretion in denying an FOIA plaintiff's request for *in camera* review even though the government's affidavits were found to be sufficiently descriptive. But, as the court of appeals made clear in a separate order in this case, the present case has strictly nothing to do with the trial judge's discretion to order an *in camera* review -- whether or not the proposed affidavits or index are sufficient. *See* Pet. App. at 40a ("We expressed no views as to when, or whether, submission of [adequate] affidavits would make *in camera* review of the withheld documents unnecessary"). At issue was not the district court's decision to review the documents *in camera*; rather, it was the decision to reach a conclusion on that basis alone.[17]

II. Review By This Court Would Be Premature

1. This case comes before the Court on the basis of a decision that holds only that petitioners' half-hearted effort to explain its withholdings was insufficient and that a more helpful affidavit was necessary. In

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[17]On more than one occasion, petitioners read the court of appeals' opinion as holding that the trial judge erred in conducting *in camera* review, thereby "curtail[ing] the discretion of district courts" on such matters. *See, e.g.*, Pet. Br. at 11-12, 24. Of course, the opinion did nothing of the sort. It did not disturb, nor, indeed, even speak to, the scope of the district court's discretion to conduct *in camera* review -- for the simple reason that neither party challenged that decision. Cases such as *Vaughn v. United States*, 936 F.2d 862 (6th Cir. 1991), and *Lam Lek Chong v. United States Drug Enforcement Admin.*, 929 F.2d 729 (D.C. Cir. 1991), upon which petitioners rely (Pet. Br. at 13, 14 n.10), are thus inapposite.

short, the court merely required an affidavit conforming to Congress' mandate that the government carry its burden of establishing valid exemptions. Surely, petitioners cannot claim that *that* burden is excessive, especially since they have yet attempted to meet it. Were the court to reject a subsequent serious attempt to meet this criteria, there would then be ample time to consider petitioners' claim that the decision "places an intolerable burden on the government" (Pet. Br. at 21).[18] But at this point in the case, and on this

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[18]There is no basis in the record for petitioners' estimates regarding the time it might take to prepare an adequate *Vaughn* index. *See* Pet. Br. at 21 n.17. Their inclusion in the petition for certiorari is thus as inappropriate as it is unwarranted. Moreover, the claim that the ruling below will inevitably result in an intolerable burden to governmental agencies is undercut by the fact that agencies, including but not limited to the FBI, routinely submit affidavits far more complete than the one at issue in this case.

Petitioners also make the claim that the decision will place a substantial burden on the courts. *Id.* As explained above, the contrary is true: By compelling appellate courts to undertake *in camera* review, even in the absence of adequate guidance from the agency, petitioners' procedure will unduly tax the court system.

record, the claim is speculative.[19] Review by this Court would thus be premature.

2. Petitioners also contend that the court of appeals "formulated onerous substantive FOIA requirements" regarding the scope of exemptions (Pet. Br. at 15). In fact, the court never engaged in the task of assessing whether a particular exemption applied, leaving that question to be addressed in the first instance by the district court on the basis of a more adequate record. The court specifically refused to rule on the district court's grant of summary judgment for the agency, holding instead that "[i]t would be premature to address Wiener's claim. Without an adequate *Vaughn* index and sufficient findings of fact to guide us we cannot say whether these documents, in light of the rest of the record, raise a triable issue of fact" (Pet. App. at 31a). As a result, the court of appeals' opinion will have

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[19]Petitioners repeatedly make the claim that, in the course of discussing the adequacy of the FBI's *Vaughn* index, the court of appeals disclosed exempt information, thereby demonstrating the "unworkability" of the Ninth Circuit's "rule." *See* Pet. Br. at 12, 19-20. Wiener disputes the accuracy of petitioners' assertion regarding the alleged disclosures. However, even assuming that the FBI's characterization is correct, the conclusion it draws simply does not follow. To begin, even if the court erred while attempting to illustrate how the FBI could have complied with a well-settled standard in this particular case, that would not mean that the standard itself is faulty. More importantly, there is no reason for this issue ever to arise. For it is the agency's duty to furnish adequate explanations and the court's responsibility to appraise them; in that situation, the government can be trusted not to divulge information it believes should be withheld.

no impact on the interpretation and scope of FOIA exemptions.

The Court's decision in *Department of Justice v. Reporters Committee*, 489 U.S. 749 (1989), on which petitioners heavily rely, thus has no bearing on this case. There was no suggestion in *Reporters Committee* that the agency had inadequately explained its withholdings, no question as to the type of documents whose disclosure had been requested -- rap sheets -- and no uncertainty regarding the asserted interests on both sides. Therefore, the Court was able to engage in categorical decision-making, treating all rap sheets on private citizens alike. *Id.*, at 799-80. In contrast, the agency's affidavits in this case were insufficient to define what category petitioners claimed were exempt. Indeed, given the wide range of disparate documents to which they sought to apply Exemption 7(C), the only category broad enough to include them all appears to be one embracing *all* conceivable FBI documents, an outcome that would provide the agency a total exemption from FOIA. Nor did the affidavits suffice to show that the documents were compiled for legitimate law enforcement purposes. In sum, the issues in the present case were several steps removed from the far more focused one decided in *Reporters Committee*.

For the same reasons, the decision here does not conflict with any of the other cases cited by petitioners which deal with the substantive requirements under Exemptions 7(C) or 7(D). *See* Pet. Br. at 17-19. In all of them, the courts were able to decide the merits of a claimed exemption, either because the agency's affidavit was adequate, or because the overall record left no doubt as to factual issues that were critical for making such a determination. In other words, the substantive questions addressed in the cases relied on by petitioners

had reached the stage where they were fit for judicial resolution; here, they had not.[20]

Petitioners will be able to challenge rulings both on the adequacy of their subsequent affidavit, if their future submissions are rejected, or on the scope of FOIA exemptions, if they are dissatisfied with that decision. But it would be premature for this Court to grant review when no substantive decision has been reached, the record is incomplete, and the implications of the ruling below are speculative at best.

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[20]In particular, petitioners' assertion notwithstanding (Pet. Br. at 18-19), there is no inconsistency between the opinion below and decisions that have held that information provided to a law enforcement agency is presumed to have been given in confidence. In fact, the court of appeals deliberately refrained from confronting the matter, stating simply that "regardless of what presumption may be appropriate," a court needs enough information to determine whether it might be rebutted (Pet. App. at 26a n.29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: May 28, 1992

Respectfully submitted,

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FILED
JUN 3 1992
OFFICE OF THE CLERK

(3)

No. 91-1641

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL BUREAU OF INVESTIGATION, ET AL., PETITIONERS

v.

JONATHAN M. WIENER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent does not come to grips with any of the reasons set forth in our petition for granting certiorari. Instead, he simply, and mistakenly, denies that the Ninth Circuit has adopted a maximum-detail standard of specificity for *Vaughn* indices. Respondent dismisses the novel substantive requirements established by the Ninth Circuit for the exemptions at issue as dicta, even though the court's discussion of those requirements consumes the bulk of its opinion. He similarly shrugs off the fact that the Ninth Circuit itself disclosed exempt information in applying its maximum-detail standard. These avoidance tactics cannot obscure the unprecedented nature of the decision below, upon which numerous district courts in the Ninth Circuit have already relied to

require a level of detail in *Vaughn* indices unparalleled in the other circuits.

1. Respondent asserts (Br. in Opp. 5) that the Ninth Circuit "simply applied settled procedural principles of FOIA litigation to the particular facts of this case." The Ninth Circuit's own conduct refutes that assertion. The Ninth Circuit has required the submission of additional *Vaughn* indices, even though the district court has already reviewed six public declarations, two *in camera* declarations, and the disputed documents themselves in unredacted form. See Pet. 2; Pet. App. 2a. As we explained in the petition, in this respect the decision below is unprecedented. Pet. 14. We are not aware of any other decision (and respondent cites none) in which a court of appeals has required the submission of additional *indices* after the district court has reviewed the *documents* themselves. Instead, until the decision below, the courts of appeals had uniformly held that, when a district court determines that the *Vaughn* indices are inadequate, it has discretion to inspect the disputed documents *in camera*. See Pet. 14 n.10 (citing cases).

Respondent unwittingly confirms the unprecedented nature of the Ninth Circuit's decision by featuring *Church of Scientology* v. *IRS*, 792 F.2d 146 (D.C. Cir. 1986), as a case "[d]irectly on point" (Br. in Opp. 16). Actually, *Church of Scientology* involved quite different facts from the present case, but it is relevant inasmuch as it sharply undercuts respondent's position. *Church of Scientology* did not even involve the adequacy of a *Vaughn* index, as does the present case. In *Church of Scientology*, the government did not submit any *Vaughn* index, either publicly or *in camera*. 792 F.2d at 153. The district court granted summary judgment for the gov-

ernment based solely upon its *in camera* inspection of a 5600-page sampling of the disputed documents. *Id.* at 148.[1]

The D.C. Circuit reversed, holding that "such an approach cannot be applied to large numbers of documents—much less to large numbers of documents that represent only a sampling." *Church of Scientology*, 792 F.2d at 153. At the same time, the court stressed that "*in camera* * * * inspection of each of a small number of documents without detailed public affidavits and *Vaughn* indices is sometimes acceptable." *Ibid.* (citing *Currie* v. *IRS*, 704 F.2d 523 (11th Cir. 1983)). Moreover, while the court required the IRS on remand to support its exemption claims by submitting "an appropriate combination of

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[1] Likewise, none of the other D.C. Circuit decisions cited by respondent involved the adequacy of a *Vaughn* index. In *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), cited in Br. in Opp. 17, the district court granted summary judgment for the government based solely on its *in camera* inspection of disputed documents. The government had not submitted a *Vaughn* index, and the D.C. Circuit held that the government was required to do so. Respondent's reliance (Br. in Opp. 15) on *Lykins* v. *United States Dep't of Justice*, 725 F.2d 1455 (D.C. Cir. 1984), and *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976), is also wide of the mark. In *Phillippi*, the district court relied solely on an *in camera* declaration; the government did not submit a public *Vaughn* index, and the court refused to examine the documents themselves *in camera*. 546 F.2d at 1012-1013. Moreover, in reversing, the court of appeals recognized, in sharp contrast to the court of appeals below, that "FOIA contemplates that the courts will resolve fundamental issues in contested cases on the basis of *in camera* examinations of the relevant documents." *Ibid.* In *Lykins*, the court of appeals affirmed in part a district court decision that was based on the court's *in camera* inspection of the disputed documents and declarations, finding "no reason to believe that [the district court] reached an incorrect result" as to one of the disputed documents. 725 F.2d at 1463. As to another document, the court remanded the case because no public *Vaughn* index had been provided. *Id.* at 1465.

detailed public affidavits and (if necessary) indices," the court expressly authorized "resort[] to *in camera* examination of documents and affidavits [if] th[e] [public affidavits and declarations] proved inadequate." *Church of Scientology*, 792 F.2d at 153. That is precisely what the court of appeals in this case held was *not* authorized. The Ninth Circuit expressly disapproved the district court's resort to *in camera* inspection, holding that *in camera* review is "only appropriate" after the government has submitted a *Vaughn* index that meets the Ninth Circuit's maximum-detail standard. Pet. App. 8a.

Contrary to respondent's contention, it is *Church of Scientology*, and not the decision below, that reflects the "settled procedural principles of FOIA litigation" (Br. in Opp. 5). Prior to the decision below, it was well settled that "the [district] court's management of [a FOIA] case w[ould] not be disturbed absent an abuse of discretion." *Currie*, 704 F.2d at 530; see also *Silets* v. *United States Dep't of Justice*, 945 F.2d 227, 229 (7th Cir. 1991), petition for cert. pending, No. 91-1133. Thus, the courts of appeals uniformly recognized that the proper inquiry on appeal was whether the district court had an adequate factual basis on which to make the *de novo* determination required by FOIA. See, *e.g.*, *Vaughn* v. *United States*, 936 F.2d 862, 867 (6th Cir. 1991); *Currie*, 704 F.2d at 528. With similar consistency, the courts of appeals held that a *Vaughn* index provides an adequate factual basis if it "(1) describe[s] the withheld documents and the justifications for nondisclosure with reasonably specific detail, (2) demonstrate[s] that the information withheld falls logically within the claimed exemption, and (3) [is] not controverted by either contrary evidence in the record or by evidence of bad faith." *Silets*, 945 F.2d at 229

(quoting *Kimberlin* v. *Department of Treasury*, 774 F.2d 204, 210 (7th Cir. 1985)).[2]

Here, in contrast, the Ninth Circuit considered it irrelevant that the district court had an adequate factual basis for its decision.[3] All that mattered, in the court of appeals' view, was that the government disclose "as much information as possible," purportedly in order to maximize respondent's opportunity to argue for disclosure. Pet. App. 7a. Certainly, nothing in the *statute* creates such a procedural entitlement; the statute does not mandate *Vaughn* indices in the first place, but *does* expressly authorize *in camera* review of the actual documents.

2. The district courts in the Ninth Circuit do not share respondent's view that the decision below reflects merely an "unremarkable" application of "well-settled standard[s]" (Br. in Opp. 6, 20 n.19). As discussed in our petition, courts in several pending cases have relied on the decision below to order the government to prepare and submit additional, maximum-detail *Vaughn* indices. Pet. 21-22 nn.17-18, 25 n.21. Those orders, entered so far in only a portion of the dozens of FOIA cases pending against the government in the Ninth Circuit, have

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[2] Respondent distinguishes *Silets* (Br. in Opp. 17-18) based on the procedural posture of that case. Respondent does not, however, respond to our argument (Pet. 22-24) that the Seventh Circuit in *Silets* applied quite different standards for judging the adequacy of *Vaughn* indices than the Ninth Circuit announced in the present case.

[3] Contrary to respondent's contention (Br. in Opp. 13 n.12), the district court made clear that it "carefully" examined the government's *in camera* declarations, to which the unredacted documents were appended (Pet. App. 36a), and that it based its decision on the *in camera* declarations and the public declarations (*id.* at 32a-35a).

required the expenditure of hundreds of additional hours of attorney time. Pet. 21-22 n.17.

Miscavige v. *IRS*, Civ. No. 88-7341-TJH (Kx) (C.D. Cal.), is representative.[4] In that case, the plaintiff seeks access to some 53,000 pages of records withheld in whole or in part. Over a period of six months, the Service devoted almost 2200 hours of attorney time and 500 support-staff hours to produce a 5436-page *Vaughn* index. Prior to the decision below, the district court issued an order denying the plaintiff's motion for a more detailed *Vaughn* index. In light of the decision below, however, the Special Master has recommended that the district court vacate its order, stating that the Ninth Circuit now "seems to require a much greater degree of specificity in a Vaughn Index than previously thought." First Report of Special Master in *Miscavige*, *supra*, at 1 (May 22, 1992).

Similarly, in *Church of Scientology Int'l* v. *IRS*, No. CV-91-1025-RSWL (Sx) (C.D. Cal. order dated Nov. 14, 1991), the district court initially denied the plaintiff's motion to compel preparation of a *Vaughn* index, holding that "the *Vaughn* index is not the only means by which Defendant may sustain its burden of establishing that the withheld documents are properly exempt from disclosure. . . . Thus, Defendant may sustain its burden by submitting detailed, non-conclusory affidavits setting forth facts sufficient to establish each exemption with a motion for summary judgment." *Id.* at 2-3 (quoting prior order of June 21, 1991). The court granted reconsideration of that ruling, however, after the decision below was issued. The court determined that revision of the prior

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[4] See also *Tsang* v. *CIA*, No. CV 91-4438 WMB (C.D. Cal. order dated June 1, 1992) (applying *Wiener* to require more detailed *Vaughn* index); 4/7/92 Findings of Fact and Concl. of Law on Pltfs. Renewed Mot. for Summ. J'mt in *Selby* v. *United States Dep't of Justice*, CV 91-0342-RG (GHKx) (C.D. Cal.) (applying *Wiener*).

order was necessary because "*Wiener* * * * heighten[s] the demands which will be placed on the government * * * in these actions." *Id.* at 3.[5]

In addition to the significant and unwarranted demands that the decision below places on the government, the courts likewise confront substantial and unjustified new burdens. Respondent confirms (Br. in Opp. 22) our observation (Pet. 21) that another round of district court and appellate litigation is likely in this nine-year-old lawsuit, again concerning only the adequacy of the *Vaughn* indices, before even reaching the merits of the district court's decision. Indeed, such endless litigation could well become the rule in the Ninth Circuit, given the requirement that the government disclose as much as it can in the *Vaughn* index without revealing exempt information, and the prohibition on *in camera* review until the government has done so. See *Starkey* v. *IRS*, No. CV 91-4158-WDK (C.D. Cal. order dated Nov. 17, 1991), at 6 n.3 (citing *Wiener* for the proposition that district

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[5] Respondent does not address in any meaningful way our showing that the Ninth Circuit's maximum-detail requirement will impose a staggering burden on government agencies in FOIA litigation. Instead, respondent groundlessly criticizes the government for failing to document the impact of the decision below before the decision was issued. Br. in Opp. 19 n.18. Respondent also erroneously suggests that it is undisputed that the government could have disclosed more in its public *Vaughn* indices than it did (*id.* at 15-16). In fact, the declarant who prepared the FBI's *Vaughn* index regarding non-Exemption 1 claims stated that "[t]o further describe with any more specificity the information being withheld would identify the very material sought to be protected." Clerk's Record (CR) 18 ¶ 21. The author of the FBI's declaration regarding information withheld under Exemption 1 similarly stated that "the degree of declassification and marking for disclosure is as great as permissible without placing the national security in jeopardy." CR 17 ¶ 6 n.8.

courts lack discretion to conduct *in camera* review if the *Vaughn* index is inadequate).[6]

Moreover, there is a significant risk that, in laboring under this new procedural regime, the courts will themselves disclose exempt information, like the Ninth Circuit did here. See Pet. 17-18, 19-20. Contrary to respondent's assertion, Br. in Opp. 20 n.19, the Ninth Circuit's inability to apply its own standard without making unlawful disclosures convincingly demonstrates both the unworkability of that standard and the serious risk that courts confront in attempting to apply it.

3. The panel below would be surprised to learn that its discussion of the requirements that the government must meet on remand, which consumed the bulk of its opinion (Pet. App. 8a-28a), "will have no impact on the interpretation and scope of FOIA exemptions," as respondent asserts (Br. in Opp. 20-21). Unlike respondent, the lower courts have not treated the court of appeals' discussion as dictum.

For example, in *Selby* v. *United States Dep't of Justice*, No. CV 91-0342 RG (GHKx) (C.D. Cal. order dated Apr. 7, 1992), the district court expressly relied on the

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[6] Respondent does not directly respond to our point that the decision below will breed pointless and burdensome litigation regarding the adequacy of *Vaughn* indices. Instead, he sets up a strawman by asserting (Br. in Opp. 13) that the courts should not be required to review an agency's decision to withhold documents "without the benefit of the government's * * * guidance," followed by a citation to a decision that (though it is not noted in respondent's citation) was subsequently vacated, *Seafarers Int'l Union* v. *Baldovin*, 508 F.2d 125, vacated, 511 F.2d 1161 (5th Cir. 1975). Respondent later suggests that the district court here made its decision on the basis of *in camera* inspection of the documents "alone" (Br. in Opp. 18). Nothing could be further from the truth. As we explained in our petition, Pet. 2-4, the government submitted, in addition to the unredacted documents, six public *Vaughn* indices and two *in camera* declarations.

Ninth Circuit's holding in this case regarding the FBI's claims under Exemption 7(D), 5 U.S.C. 552(b)(7)(D). The panel held that, in order to justify withholding information provided under an implicit assurance of confidentiality pursuant to Exemption 7(D), the FBI must identify, for each source, "the circumstances surrounding the receipt of information which led the FBI to conclude the informant would not have given the information without an implicit assurance of confidentiality." Pet. App. 26a. As explained in our petition, the Ninth Circuit's holding on Exemption 7(D) is in direct conflict with the decisions of at least five other circuits, which hold that the FBI need not demonstrate an implicit assurance of confidentiality on a source-by-source basis. Pet. 18-19.

Similarly, the Ninth Circuit's holding in this case on the government's Exemption 7(C) claims conflicts with this Court's decision in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), as well as decisions of the D.C. Circuit and the Eleventh Circuit. See Pet. 15-17; see also *Church of Scientology*, 792 F.2d at 152 ("When * * * a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile.").

The Ninth Circuit's establishment of substantive requirements for invoking the FOIA exemptions at issue were plainly intended to have, and will have, a concrete impact both on remand in this case and in other FOIA litigation. That those requirements flow directly from the Ninth Circuit's erroneous standard for *Vaughn* indices reinforces the need for further review.

4. This case graphically illustrates the need for "workable rules" to govern the manner in which FOIA litigation is conducted. See Pet. 24-25. By respondent's

own estimate, he has received "twenty-six pounds of FBI and Immigration and Naturalization Service files * * * under the Freedom of Information Act." J. Wiener, *Come Together: John Lennon in His Time*, liner notes (1984). The district court's judgment reflects that disclosure of the comparatively little information that remains in dispute will not vindicate the public's interest in knowing "what th[e] government is up to." *Reporters Committee*, 489 U.S. at 773 (internal quotation marks omitted) (citations omitted). Nonetheless, disdaining to review the district court's judgment on the merits, the court of appeals has remanded for further proceedings that promise to be far more elaborate than anything yet confronted in this nine-year-old litigation. The concomitant drain on agency and judicial resources serves only to undermine FOIA's policy of "expediting disclosure." *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983).

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For the foregoing reasons, and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

JUNE 1992